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No. 10458

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

PORTLAND TRUST AND SAVINGS BANK, a corporation, Guardian of the Estate of William V. Mahoney, Incompetent,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United St
for the District of Oregon

Rotary Colorprint, 590 Folsom St., San Francisco 60—

No. 10458

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Rotary Colorprint, 590 Folsom St., San Francisco 60—8-19-43

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADRESSES OF THE ATTORNEYS OF RECORD

For Appellant

CARL C. DONAUGH,

United States Attorney for the District of Oregon, and

J. MASON DILLARD,

Assistant United States Attorney for the District of Oregon,
United States Court House, Portland, Oregon, and

FRANCIS J. McGAN,

Attorney of the Department of Justice, Federal Building, Butte, Montana.

For Appellee

ALLAN A. BYNON and
GERALD J. MEINDL,

American Bank Building, Portland, Oregon.

In the District Court of the United States
for the District of Oregon November Term, 1941

Be It Remembered, That on the 19th day of November, 1941, there was duly filed in the District Court of the United States for the District of Oregon, a Complaint, in words and figures as follows to wit: [1*]

In the District Court of the United States
For the District of Oregon

Civil No. 923

PORTLAND TRUST AND SAVINGS BANK, a corporation, Guardian of the Estate of WILLIAM V. MAHONEY, Incompetent,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT

Comes now the plaintiff and for cause of action against the defendant complains and alleges:

I.

That during all the times hereinafter mentioned the plaintiff, Portland Trust and Savings Bank, was, ever since has been and now is a corporation, duly organized and existing under and by virtue of the laws of the State of Oregon with its princi-

*Page numbering appearing at foot of page of original certified Transcript of Record.

pal place of business in the City of Portland, Oregon, and is duly qualified under and by virtue of the laws of the State of Oregon to act as administrators, executors and guardians, and said plaintiff is now the duly appointed, qualified and actings guardian of the above named William V. Mahoney, an incompetent and brings this action for and on behalf of the said William V. Mahoney, incompetent.

II.

That on the 15th day of July, 1917, William V. Mahoney, the above named insured, joined the military forces of the United States of America, and on the 22nd day of May, 1920, was honorably discharged from said forces. That after his entry into said forces the said insured applied for and received a policy of war risk insurance in the sum of $10,000.00, wherein and whereby the defendant agreed, in the event of total and permanent disability of the above named insured occurring while said policy of insurance was in force and effect, that the defendant would pay the above [2] named insured the sum of $57.50 per month for the above named insured's life, commencing on the date the said insured became permanently and totally disabled, in consideration of the premiums to be paid by him as made and provided by law, and that the said policy of war risk insurance was by the said insured kept in full force and effect by the payment of said premiums up to the 1st day of August, 1920, and by reason of the grace period said insurance

remained in force and effect up to and including the 31st day of August, 1920.

III.

That after insured's entry into the military forces of the United States, and while he was in the services of the said military forces of the United States of America, and while in line of duty, and while said policy was in full force and effect, the said insured, as a result of physical and mental disabilities, became permanently and totally disabled, and was so permanently and totally disabled upon the 22nd day of May, 1920, the date of his honorable discharge from said military forces of the United States of America and while the said policy was in full force and effect, in that he was at that time, ever since has been and now is and will ever be unable to follow continuously any substantially gainful occupation. The said conditions then existing were founded upon conditions reasonably certain to prevail throughout the said insured's lifetime.

IV.

That the said William V. Mahoney now is and has been insane and mentally incompetent on and continuously since the date of his honorable discharge, May 22, 1920, and was rated as incompetent and insane by the Veterans Administration on and prior to the 3rd day of July, 1931.

V.

Prior to the commencement of this action plaintiff made claim for and on behalf of the above

named incompetent to the Veterans Administration on the ground of said incompetent's permanent and total disability for the payments due on said policy of war risk insurance from the [3] date of said incompetent's honorable discharge for the term of his natural life, and that said incompetent be given a permanent and total disability rating from the date of his honorable discharge from the military forces of the United States of America, to-wit. May 22, 1920, and at all times subsequent thereto, but said defendant disagreed with plaintiff and denied plaintiff's claim, and has failed and refused, and now fails and refuses to pay the plaintiff the sums due it for and on behalf of the said incompetent under the terms of said policy. Further the defendant issued to the plaintiff, prior to the commencement of this action, a letter of disagreement denying plaintiff's claim.

Wherefore, plaintiff prays for judgment and for an order of this Court that the above named incompetent, William V. Mahoney, be adjudged to have been, on May 22, 1920 and at all times subsequent thereto totally and permanently disabled and prays for a judgment that payments be made to plaintiff, for the benefit of said incompetent, William V. Mahoney, under and pursuant to the terms and conditions of said incompetent's said war risk insurance policy, by the defendant.

ALLAN A. BYNON
GERALD J. MEINDL
Attorneys for Plaintiff [4]

State of Oregon,
County of Multnomah—ss.

I, Chester J. Irelan, being first duly sworn, on oath depose and say: That I am the duly appointed, qualified and acting Assistant Trust Officer of the Portland Trust and Savings Bank; that the Portland Trust and Savings Bank is the duly appointed, qualified and acting guardian of the person and estate of William V. Mahoney, incompetent; and that the foregoing complaint is true, as I verily believe.

PORTLAND TRUST AND SAVINGS BANK

By (Signed) CHESTER J. IRELAN
Assistant Trust Officer.

Subscribed and sworn to before me this 12th day of November, 1941.

(Sgd) GERALD J. MEINDL
[Notarial Seal] Notary Public for Oregon.
My commission expires July 25, 1944

[Endorsed]: Filed November 19, 1941. [5]

And Afterwards, to wit, on the 17th day of January, 1942, there was duly Filed in said Court, an Answer, in words and figures as follows to wit: [6]

[Title of District Court and Cause]

ANSWER

Now comes the defendant the United States of America, by Carl C. Donaugh, United States Attorney in and for the District of Oregon, and Francis J. McGan, Attorney, Department of Justice, and for its answer to the complaint filed by the plaintiff herein says:

I.

Defendant says it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered I of the complaint and therefore denies the same.

II.

Defendant denies the allegations contained in paragraph numbered II of the complaint but in further answer thereto admits and alleges that william Vincent Mahoney enlisted in the military services of the United States of July 13, 1917, and was honorably discharged therefrom on May 22, 1920; that while in the military service, on December 7, 1917, he applied for and was granted a contract of war risk yearly renewable term insurance in the amount [7] of $10,000, premiums on which were paid to include the month of July 1920 but no premiums were paid thereafter.

III.

Defendant denies the allegations contained in paragraph numbered III of the complaint.

IV.

Defendant denies the allegations contained in paragraph numbere IV of the complaint.

V.

Defendant denies the allegations contained in paragraph numbered V of the complaint except that defendant admits and alleges that on July 28, 1941, a formal claim for insurance benefits, on Veterans Administration Forms 579 and 579a, was filed in the Veterans Administration by the Portland Trust and Savings Bank, as guardian of William Vincent Mahoney, wherein it was alleged that the insured became totally permanently disabled May 22, 1920; that said claim was denied by a decision of the Insurance Claims Council rendered November 3, 1941, notice of which was transmitted to the Portland Trust and Savings Bank, as guardian of William Vincent Mahoney, by registered letter of the same date.

Defendant denies each and every allegation contained in the complaint not specifically admitted herein and demands a trial by jury in this action.

CARL C. DONAUGH,
United States Attorney
By C. LAIRD McKENNA,
Assistant United States Attorney
FRANCIS J. McGAN
Attorney, Department of Justice.

[Endorsed]: Filed January 17, 1942. [8]

And Afterwards, to wit, on Thursday, the 10th day of December, 1942, the same being the 36th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United State District Judge, presiding, the following proceedings were had in said cause, to wit: [9]

[Title of District Court and Cause.]

AMENDED PRE-TRIAL ORDER

This cause came on regularly for pre-trial before the Court, Honorable James Alger Fee, Judge, presiding, the plaintiff being represented by its counsel, Bynon & Meindl, and the defendant being represented by its counsel, Honorable Carl C. Donaugh, United States Attorney for the District of Oregon; Honorable J. Mason Dillard, Assistant United States Attorney for the District of Oregon, and Honorable Francis J. McGan, Attorney for the Department of Justice;

This Pre-Trial Order is to supersede the Pre-Trial Order heretofore entered in this cause:

Whereupon the parties agreed that the Portland Trust and Savings Bank, a corporation, is the duly appointed, qualified and acting Guardian of the Estate of William V. Mahoney, Incompetent, and as such Guardian brings this action for and on behalf of the said William V. Mahoney, Incompetent;

The parties further agreed that the insured, William V. Mahoney, enlisted in the military service of the United States on July 13, 1917, and was honorably discharged therefrom on May 22, 1920; that

on December 7, 1917, the insured applied for and was granted a contract of War Risk Yearly Renewable Term Insurance in the sum of $10,000.00, wherein and whereby the defendant agreed, in the event the insured became permanently and totally disabled while said insurance policy was in full force and effect, to pay the insured the sum of $57.50 per month so long as he remained permanently [10] and totally disabled, in consideration of the premiums to be paid by the insured, as made and provided by law, and that the premiums on said insurance were paid to include the month of July, 1920, but no premiums were paid thereafter, and that by reason of the grace period said policy of insurance remained in full force and effect to and including the 31st day of August, 1920;

It was further agreed that the plaintiff herein, as Guardian of the Estate of William V. Mahoney, filed claim for insurance benefits with the Veterans Administration on Veterans Administration Forms 579 and 579a, July 28, 1941, alleging that the insured became permanently and totally disabled May 22, 1920, and that said claim was denied by a decision of the Insurance Claims Council of the Veterans Administration, dated November 3, 1941, and that notice of said denial was dispatched to the plaintiff herein as Guardian of William V. Mahoney by registered mail, November 3, 1941;

Defendant denies that the insured, as a result of physical and mental disabilities, became permanently and totally disabled the 22nd day of May, 1920, or at any time during the period of insurance

protection under the above-mentioned policy of War Risk Yearly Renewable Term Insurance, and further denies that the insured, William V. Mahoney, was insane and mentally incompetent on May 22, 1920, or that he has been continuously since said date insane or incompetent or that he was rated as insane or incompetent by the Veterans Administration on or prior to the 3rd day of July, 1931;

Therefore, the

QUESTIONS FOR DETERMINATION

are:

1. Was the insured insane or was said insured rated by the Veterans Administration as insane or incompetent on or prior to the 3rd day of July, 1931?

2. Has the Court jurisdiction to hear and determine this cause?

3. Did the insured become permanently and totally disabled as a result of physical and mental disabilities May 22, 1920, or at any time when his War Risk Yearly Renewable Term Insurance [11] was in full force and effect?

EXHIBITS

Defendant's Exhibits

Exhibit No. 1

File of Veterans Bureau examination reports. No objection.

Exhibit No. 2

Application for compensation, Form 526.

No objection.

Exhibit No. 3

Statement of compensation payments.

Objected to on the ground that it is incompetent, irrelevant and immaterial and pertains to compensation and not to matters in issue in this cause.

Plaintiff's Exhibits

Exhibit No. 4

A. G. O. Record.

Objection to those portions pertaining to or setting forth what was considered a percentage of disability at the time insured was discharged and prior thereto on the ground that those are conclusions of persons who are not produced for cross-examination and that they are in invasion of the province of the jury and can not bind the defendant in this case.

Exhibit No. 5

Deposition taken in Wilwaukee, Wisconsin.

John J. Mahoney.

Objection in deposition waived by both parties.

Exhibit No. 6

Depositions taken by plaintiff in Minneapolis, Minn.

J. A. Hennessy, Walter Dooley, A. E. Abbott.

Objections in deposition waived by both parties.

Exhibit No. 7

Deposition of sister of insured, taken in Portland, Oregon.

Mrs. Frank Donaheu.

Objections waived by both parties.

Exhibit No. 8

Deposition taken by defendant at Seattle, Washington.

George Dunlap, James E. Mahoney, Francis Patrick Mahoney.

Objections waived by both parties except as to Exhibit 8a. [12]

Exhibit No. 8-A

A letter.

Admission objected to by plaintiff in grounds stated in Exhibit No. 8.

Exhibit No. 9

Deposition taken by defendant at Minot, North Dakota.

T. J. McGrath, Nels O. Nelson, Blanche Callahan.

Objections waived by both parties.

Exhibit No. 10

Records of Oregon State Hospital, Salem, Oregon.

No objections.

Exhibit No. 11

Compensation Rating Sheet.

Objection by defendant on the ground that it tends to illustrate no issue in the case; is

hearsay, incompetent, irrelevant, and immaterial, and invades the province of the jury.

Exhibit No. 12

Honorable Discharge of William V. Mahoney. No objections.

This pre-trial order supercedes the pleadings and shall not be amended or changed during the trial except by consent or to prevent manifest injustice.

Dated at Portland, Oregon, this 10th day of December, 1942.

JAMES ALGER FEE
District Judge

Approved: Allan A. Bynon, and Gerald J. Meindl, Attorneys for Plaintiff. Daniel Dillon and Francis J. McGan, Attorneys for Defendant.

[Endorsed]: Filed December 10, 1942. [13]

And Afterwards, to wit, on the 12th day of December, 1942, there was duly Filed in said Court, answer by the jury to interrogatories in words and figures as follows, to wit: [14]

[Title of District Court and Cause.]

SPECIAL INTERROGATORIES

Interrogatory No. 1

Do you find from the evidence that the insured, William V. Mahoney, was insane on July 3, 1931?

Yes.

Interrogatory No. 2

Do you find from the evidence that the insured,

William V. Mahoney, was permanently and totally disabled May 22, 1920 or at any time when his War Risk Yearly Renewable Term Insurance was in full force and effect?

Yes.

Dated this 12th day of December, 1942.

HOLT STOCKTON
Foreman.

[Endorsed]: Filed December 12, 1942. [15]

And Afterwards, to wit, on the 12th day of December, 1942, there was duly Filed in said Court, a Verdict in words and figures as follows, to wit: [16]

[Title of District Court and Cause.]

VERDICT

We, the jury, duly impaneled and sworn to try the above entitled cause, do find in favor of the plaintiff and against the defendant, and find that the insured, William V. Mahoney, was, on the 22nd day of May 1920, and ever since has been totally and permanently disabled, and further find that the insured, William V. Mahoney, was, on the 3rd day of July 1931, and ever since has been and is now, insane.

Dated at Portland, Oregon, this 12th day of December, 1942.

HOLT STOCKTON
Foreman.

[Endorsed]: Filed December 12, 1942. [17]

And Afterwards, to wit, on Monday, the 14th day of December, 1942, the same being the 39th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit:

[18]

In the District Court of the United States
for the District of Oregon

No. Civ-923

PORTLAND TRUST AND SAVINGS BANK, a corporation, Guardian of the Estate of WILLIAM V. MAHONEY, Incompetent,
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause coming on for trial upon the 10th day of December, 1942, before the Honorable James Alger Fee, Judge of the above entitled Court, plaintiff appearing in person and by its counsel, Allan A. Bynon and Gerald J. Meindl, the defendant, United States of America, appearing by its counsel, Carl C. Donaugh, United States Attorney for the District of Oregon, and Francis J. McGan and Daniel Dillon, attorneys, Department of Justice, the jury having been duly impaneled and sworn to try said cause, the opening state-

ments of counsel having been made, witnesses having been sworn and heard, the closing arguments of respective counsel having been made, the jury, having been instructed by the Court, and having had submitted to it special interrogatories and forms of verdict, did on the 12th day of December, 1942, return its special interrogatories as follows:

"1. Do you find from the evidence that the insured, William V. Mahoney, was insane on July 3, 1931? Yes.

2. Do you find from the evidence that the insured, William V. Mahoney, was permanently and totally disabled on May 22, 1920 or at any time when his war risk yearly renewable term insurance was in full force and effect? Yes."

and said jury did on the said 12th day of December, 1942, return its verdict as follows: [19]

"We, the jury, duly impaneled and sworn to try the above entitled cause, do find in favor of the plaintiff and against the defendant, and find that the insured, William V. Mahoney, was, on the 22nd day of May, 1920, and ever since has been totally and permanently disabled, and further find that the insured, William V. Mahoney, was, on the 3rd day of July, 1931, and ever since has been and is now, insane.

Dated at Portland, Oregon, this 12th day of December, 1942.

HOLT STOCKTON
Foreman"

Now, Therefore, the Court, being advised in the premises and according to said findings on said special interrogatories and according to said verdict, does enter its judgment, and

It Is Ordered and Adjudged that the said William V. Mahoney was on the 22nd day of May, 1920, and ever since has been and now is permanently and totally disabled, and further, said William V. Mahoney was on the 3d day of July, 1931 and ever since has been and is now insane and judgment is entered herein in favor of the above named plaintiff and against the defendant, United States of America, and that there is now due said plaintiff for the benefit of its ward, William V. Mahoney, incompetent, upon said policy of war risk insurance carried by said William V. Mahoney, which is referred to in the complaint herein, the accrued payments of $57.50 per month from the 22nd day of May, 1920, until this date, and

It Is Further Ordered and Adjudged that there be and hereby is allowed to said plaintiff's attorneys, Allan A. Bynon and Gerald J. Meindl, as a reasonable attorneys fee herein ten per centum (10%) of the amount recovered by the plaintiff herein; that is to say, ten per centum of each payment that plaintiff shall hereunder and hereafter [20] collect from such insurance, to be paid to the said Allan A. Bynon and to the said Gerald J. Meindl by the Veterans Administration of the United States out of the payments to be made under this judgment at the rate of one tenth (1/10th) of each of such payments;

And It Is So Ordered.

Dated this 14th day of December, 1942.

JAMES ALGER FEE
Judge

[Endorsed]: Filed and Docketed: December 14, 1942 [21]

And Afterwards, to wit, on the 19th day of December, 1942, there was duly Filed in said Court, a Motion to set aside verdict and judgment and for judgment for defendant, in words and figures as follows, to wit: [22]

[Title of District Court and Cause.]

MOTION TO SET ASIDE VERDICT AND JUDGMENT, AND FOR JUDGMENT FOR THE DEFENDANT, IN ACCORDANCE WITH ITS MOTION TO DISMISS AND ITS MOTION FOR A DIRECTED VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL.

Comes Now the defendant, above named, and respectfully moves this Court to set aside the verdict of the Jury, filed and entered herein, and any Judgment entered thereon in the above entitled cause, and for judgment in its behalf in accordance with its Motion to Dismiss and its Motion for a Directed Verdict made at the close of all of the evidence, to-wit:

I.

Motion to Dismiss

1. That it affirmatively appears that the Court has no jurisdiction to hear and determine this cause.

2. That there has been introduced in this case no substantial evidence tending to prove that the insured was insane or that he was rated as incompetent or insane by the Veterans Administration on or prior to July 3, 1931.

3. That it affirmatively appears from the evidence in this case that on and before July 3, 1931 the insured was not insane and that he was not rated by the Veterans Administration as incompetent or insane. [23]

II.

Motion for a Directed Verdict

1. That there has been introduced in this case no substantial evidence to sustain the allegations of the plaintiff's complaint that the insured became permanently and totally disabled on or before May 22, 1920 or at any time when his War Risk Yearly Renewable Term Insurance was in full force and effect.

III.

In the event defendant's Motion to set aside the verdict of the jury, filed and entered herein, and any judgment entered thereon, and for judgment for the defendant in accordance with its Motion for a Directed Verdict, is denied; then and in that event, and in the alternative, defendant prays that

it be granted a new trial on the grounds and for the following reasons:

1. That there was introduced on the trial of this case no substantial evidence tending to prove that the insured was insane or that he was rated as incompetent or insane by the Veterans Administration on or prior to July 3, 1931.

2. That the evidence introduced in this case was insufficient to justify the verdict of the jury for the plaintiff and against the defendant.

3. Error in law occurring at the trial.

4. The verdict of the jury is against the weight of the evidence.

5. When measured by the rules of law, as stated by the Court in his charge to the jury, the evidence in this case does not justify and is insufficient to support the verdict rendered.

6. It affirmatively appears from the evidence [24] introduced in this case that the insured was able to and did for many years subsequent to May 22, 1920 follow with reasonable regularity a substantial gainful occupation without injury to his health and was, therefore, not permanently and totally disabled on May 22, 1920.

This Motion is based and will be presented on the records and files herein, upon the pleadings and Pre-trial Order, upon the evidence and exhibits introduced, the verdict of the jury, and any judgment entered thereon.

Dated this 17th day of December, 1942.

CARL C. DONAUGH
United States Attorney
DANIEL DILLON
Attorney, Department of Justice
FRANCIS J. McGAN
Attorney, Department of Justice.

[Endorsed]: Filed December 10, 1942. [25]

And Afterwards, to wit, on Monday, the 1st day of February, 1943, the same being the 80th Judicial day of the Regular November, 1942, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [26]

[Title of District Court and Cause.]

ORDER DENYING DEFENDANT'S MOTION

This matter having come on for hearing upon motion of defendant for an order setting aside the verdict heretofore rendered by the jury in the above entitled cause on the 12th day of December, 1942, and the judgment rendered on said verdict on the 12th day of December, 1942; and for an order granting defendant's motion for a directed verdict made at the close of all the evidence; and an order granting defendant's motion to dismiss the above

entitled action and for an order granting the defendant a new trial; the plaintiff appearing by Allan A. Bynon and Gerald J. Meindl, its attorneys, and the defendant appearing by Francis J. McGan, Attorney, Department of Justice, of its attorneys, and the Court having taken defendant's motion under advisement and duly considered the same and being fully advised in the premises,

It Is Ordered that said motion be and the same is hereby denied.

Dated at Portland, Oregon, this 1st day of February, 1943.

JAMES ALGER FEE
Judge

[Endorsed]: Filed: February 1, 1943 [27]

And Afterwards, to wit, on the 23rd day of April, 1943, there was duly Filed in said Court, a Notice of Appeal, in words and figures as follows, to wit: [28]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in

this action on the 14th day of December, 1942, and from the whole thereof.

CARL C. DONAUGH
United States Attorney
JAMES H. HAZLETT
Assistant United States Attorney
FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for Defendant
U. S. Court House
Portland, Oregon.

[Endorsed]: Filed April 23, 1943. [29]

And Afterwards, to wit, on the 23rd day of April, 1943, there was duly Filed in said Court, a Statement of points upon which appellant intends to rely, in words and figures as follows, to wit: [30]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH THE DEFENDANT AND APPELLANT INTENDS TO RELY ON APPEAL

Comes Now the defendant and appellant, the United States of America, and hereby specifies as the points upon which it intends to rely on appeal from judgment in the above entitled action the following:

I.

That the Court erred in denying and overruling defendant's Motion to dismiss made at the close of the plaintiff's case on each and all of the grounds as stated therein.

II.

That the Court erred in denying and overruling defendant's Motion to dismiss made at the close of all the evidence on each and all of the grounds as stated therein.

III.

That the Court erred in denying defendant's Motion for a directed verdict made at the close of all the evidence on each and all of the grounds as stated therein. [31]

IV.

That the Court erred in denying defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial on each and all of the grounds as stated therein.

Dated this 23rd day of April, 1943.

CARL C. DONAUGH
United States Attorney
JAMES H. HAZLETT
Assistant United States Attorney
FRANCIS J. McGANN
Attorney, Department of Justice
Attorneys for defendant.

Service of the above and foregoing Statement of points on which the defendant and appellant intends to rely on appeal, and receipt of a true and correct copy thereof, acknowledged this 23rd day of April, 1943.

BYNON & MEINDL
By GERALD J. MEINDL
Attorneys for plaintiff.

[Endorsed]: Filed April 23, 1943. [32]

And Afterwards, to wit, on the 23rd day of April, 1943, there was duly Filed in said Court, Designation by appellant of contents of record on appeal, in words and figures as follows, to wit: [33]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes Now the defendant and appellant herein,

The United States of America, and hereby designates as the portion of the record, proceedings and evidence to be contained in the record on appeal the following:

1. Complaint, with the date of filing endorsed thereon.
2. Answer.
3. Amended Pre-Trial Order.
4. Verdict.
5. Judgment, with the date of filing endorsed thereon.
6. Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial, with the date of filing endorsed thereon.
7. Opinion of the Court, if any has been filed, on defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial. [34]
8. Order denying defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial, with the date of filing endorsed thereon.
9. Transcript of the evidence and proceedings had at the trial except the instructions of the Court.

10. Notice of appeal, with date of filing endorsed thereon.

11. Statement of points upon which the defendant intends to rely on appeal.

12. This Designation of contents of record on appeal, and

13. Clerk's Certificate.

Dated this 23rd day of April, 1943.

CARL C. DONAUGH
United States Attorney
JAMES H. HAZLETT
Assistant United States Attorney
FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for Defendant.

Service of the above and foregoing Designation of contents of record on appeal, and receipt of a true and correct copy thereof, acknowledged this 23rd day of April, 1943.

BYNON & MEINDL
By GERALD J. MEINDL
Attorneys for Plaintiff.

[Endorsed]: Filed April 23, 1943. [35]

And Afterwards, to wit, on the 26th day of April, 1943, there was duly Filed in said Court, Designation by Appellee of additional portions of record to be included in transcript of record on appeal, in words and figures as follows, to wit: [36]

[Title of District Court and Cause.]

DESIGNATION OF ADDITIONAL MATTERS TO BE INCLUDED IN RECORD ON APPEAL

Comes Now the plaintiff and appellee herein and hereby designates the following additional matters to be contained in the record on appeal:

1. Opening statement of defendant's counsel.
2. Instructions of the Court.
3. Arguments of defendant's counsel to the jury.

Dated this 26th day of April, 1943.

BYNON & MEINDL
/s/ ALLAN A. BYNON
/s/ GERALD J. MEINDL
Attorneys for Plaintiff

[Endorsed]: Filed: April 26, 1943 [37]

And Afterwards, to wit, on the 23rd day of April, 1943, there was duly Filed in said Court, a Statement of the Evidence by appellant, in words and figures as follows, to wit: [38]

[Title of District Court and Cause.]

STATEMENT OF EVIDENCE

Portland, Oregon, December 10, 1942.
10:00 o'clock A.M.

Be It Remembered That, on this 10th day of December, 1942, at the hour of 10:00 o'clock A.M. thereof, the above entitled cause came regularly

on for hearing before the above entitled Court, the Honorable James Alger Fee, Judge, presiding.

The plaintiff appeared by Messrs. Allan A. Bynon and Gerald J. Meindl; the defendant appeared by Messrs. Francis J. McGan and Daniel Dillon.

Thereupon proceedings were had as follows:

PROCEEDINGS: [39]

The Court: Call a jury.

(A jury was thereupon duly empaneled and sworn, and opening statements made to the jury by counsel for the respective parties, after which, at 12:00 o'clock noon, December 10, 1942, a recess was taken until 2:00 [43] o'clock P. M. for the same date.)

Portland, Oregon, December 10, 1942.

2:00 P. M.

(After recess)

The Court: You may proceed, Gentlemen:

Mr. Bynon: Your Honor, I will call Mrs. Mahoney.

MRS. CLARA MAHONEY

was thereupon produced as a witness in behalf of the plaintiff herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Bynon:

Q. Now Mrs. Mahoney, if you will speak so I can hear you then I am sure all the ladies and gentlemen on the jury will hear you too, and I

(Testimony of Mrs. Clara Mahoney.)

want you to direct your answers to them. Will you state your name, please?

A. Clara Mahoney.

Q. And are you the wife of the plaintiff's ward, Mr. Mahoney, who sits here in the counsel table?

A. Yes, sir.

Q. Did you know your husband before his entry into the World War in the spring of 1917?

A. Yes, I did.

Q. Where were you living at that time?

A. At Minot, North Dakota.

Q. And were you and Mr. Mahoney sweethearts?

A. Yes.

Q. And did you keep contact with him during the time he was in the Army? A. Yes, sir.

Q. And with relation to the time he was discharged from the Army, the 22nd day of May, 1920, when were you and Mr. Mahoney married?

A. The 27th of May, 1920.

Q. Was he still in uniform at that time? [44]

A. Yes, sir.

Q. Before he left to go into Army service what kind of a man was he mentally and physically that you observed? Just tell the Court.

A. He did very hard work, you know, at that time, mason work and brick laying. He had very good health at that time.

Q. Well, how was his health at that time?

A. Just fine.

Q. What was his disposition at that time?

A. Just fine.

(Testimony of Mrs. Clara Mahoney.)

Q. Now when you were married and he was returned to civil life tell the jury what you observed about him then. What was his condition then physically and mentally?

A. He was much lighter than he used to be, and I know he couldn't do heavy work like he used to.

Q. First of all, was he well like he was before or was he otherwise?

A. No, he wasn't. He hadn't been really well since he was discharged.

Q. You mean since the date of his discharge until now? Of what has he complained? Start with when he got out of the Army. What was his trouble that you observed?

Mr. Dillon: I will object, your Honor, for the reason that it would be hearsay and self-serving declarations.

The Court: Read the question.

(The question was read.)

The Court: She may answer.

Mr. Bynon: If your Honor please, I believe the reporter has a partial answer.

The Reporter: I didn't get any answer, Mr. Bynon.

Mr. Bynon: His Honor ruled that you may answer the question.

A. He was irritable and not as strong as he used to be.

Q. Did he make any complaint about any physical ailment? A. No. [45]

(Testimony of Mrs. Clara Mahoney.)

Q. Have you been a witness before, Mrs. Mahoney?

A. This is the first time in a courtroom.

Q. Just listen to my questions and take your time and take it easy. What if anything did you notice or observe about your husband's back?

A. He had a back injury.

Q. Well, what if any complaints did he make about that? A. It pained him at times.

Q. I will ask you, Mrs. Mahoney, have you and your husband been living together through these years?

A. Except when he has been ill and at the hospital. Of course I came out west and he came out after me.

Q. You are living together now in Portland, Oregon as husband and wife? A. Yes.

Q. You look after him, do you?

A. Yes, sir.

Q. Mrs. Mahoney, knowing your husband's condition as you do, tell the jury how his condition compares now with what it was when you married him and lived with him after the war.

A. He has seizures, you know; not regular, but sometimes a month apart and sometimes a week or so apart, and then between times he feels pretty good.

Q. Take him as we see him there, is that about average or normal for him?

A. He is older, you know.

(Testimony of Mrs. Clara Mahoney.)

Q. Yes, I guess we all are, but is there any substantial difference between how he was when you folks married and settled at Minot, North Dakota and what you see today, except for his being older?

A. He is not as strong as he was, I know that. Outside of that he is the same.

Q. Speak a little louder. [46]

A. Outside of that he is the same, outside of having the seizures.

Mr. Bynon: You may cross-examine.

Cross-Examination

Mr. Dillon: Mr. Bailiff, may I have Exhibit No. 10?

By Mr. Dillon:

Q. Mrs. Mahoney, after your husband's return from the Army what did he do?

A. Well, he worked for the Northern States Power Company for about a year or so.

Q. I didn't hear you.

A. He worked for the Northern States Power Company.

Q. And how long did he work there, do you recall?

A. A year and a half or a year, something like that.

Y. And do you recall or do you know of your own knowledge what wage he received during that year and a half?

A. I think around twenty dollars a week, I believe.

(Testimony of Mrs. Clara Mahoney.)

Q. Do you recall or do you not when he took up vocational training?

Mr. Bynon: That is objected to as not gone into on direct and not proper cross-examination.

The Court: She may answer.

A. That was about 1926. He was in Seattle at that time; he was in the school up there.

Q. (By Mr. Dillon): I might state the records show it was from January, 1922 to May, 1924. Would that refresh your memory?

A. I thought it was later than that.

Q. When did you and Mr. Mahoney come to Portland, approximately? I know it is difficult to remember.

A. Well, it was around 1922 or '23.

Q. And you have lived here in Portland ever since?

A. Only the time we were at Seattle for about a year.

Q. You made some reference to Mr. Mahoney having one difference now and at the time of his discharge, that he had a seizure. [47] When to the best of your recollection do you recall he had the first seizure?

A. You mean when he had the last one?

Q. No, the first one.

A. Oh, about 1925 or around in there. I am not very good at remembering dates.

Q. And from 1925, if that were correct, until 1932 how often would you say during the year he had a seizure?

(Testimony of Mrs. Clara Mahoney.)

A. Sometimes he goes for a month without having a seizure, and sometimes he will have one every day or every week.

Q. That began, did it not, in 1932, that he began to have them as frequently?

A. That is when he went to the hospital the first time.

Q. No, the first hospital he went in 1934.

A. Well, he had them before that.

Q. I mean, he did not have them very frequently until after 1932? A. No.

Mr. Dillon: I think that is all.

Mr. Bynon: Nothing further, your Honor.

(Witness excused.)

Mr. Meindl: If your Honor please, we offer the deposition marked Pre-Trial Exhibit No. 7, being the deposition of Mrs. Frank Donahue.

The Court: You may proceed with the reading of it.

Mr. Bynon: I don't know how your Honor would prefer. I will take the stand and read the answers?

The Court: You are presenting the testimony.

Mr. Meindl: May we proceed in that way your Honor? I think it gives a better picture to the jury.

The Court: Yes. You understand now, Ladies and Gentlemen of the Jury, that the witness whose deposition is about to be read was examined under authority of this Court at a different place. The witness took the stand there, was sworn, [48] and was then questioned. The questions will now be

read by Mr. Meindl on one side, and Mr. Bynon will represent the witness in the chair, and the Government will probably read their questions on their cross-examination, and Mr. Bynon will still represent the witness. [49]

(The deposition of Mrs. Frank Donahue, Plaintiff's Pre-Trial Exhibit No. 7, was then read to the jury; said deposition, omitting all formal parts, is in words and figures as follows, to-wit:)

MRS. FRANK DONAHUE

was thereupon produced as a witness in behalf of the plaintiff herein and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Meindl:

Q. Would you state your name, please?

A. Loretta Donahue.

Q. What is your husband's name?

A. Frank Donahue.

Q. You are Mrs. Frank Donahue?

A. Yes, I am.

Q. Where do you live, Mrs. Donahue?

A. At Minot, North Dakota.

Q. How long have you lived in North Dakota?

A. Oh, about forty-five years.

Q. How do you happen to be in Oregon at the present time?

(Deposition of Mrs. Frank Donahue.)

A. Well, I came here to see my brother.

Q. What is your brother's name?

A. William V. Mahoney.

Mr. McGan: Beg your pardon?

A. William V. Mahoney.

Mr. Meindl: Is that the William V. Mahoney who is plaintiff in this case against the Government?

A. Yes, sir.

Q. How long have you been here in Oregon?

A. Since a week Tuesday.

Q. And when do you plan to leave?

A. Tomorrow morning.

Q. For home? [50] A. For home.

Q. Mrs. Donahue, where were you living prior to the time your brother, William Mahoney, went into the Army? Where were you living then?

A. At Minot.

Q. And where was William Mahoney living?

A. At his home.

Q. And where was that?

A. At—well, I just don't know. It was at Minot, North Dakota.

Q. At Minot is what I mean? A. Yes.

Q. Did you have occasion to observe him for a year or two prior to his going into the Army?

A. Yes, I did.

Q. What if anything did you notice about his mental and physical condition at that time?

A. Well, he was in the best of health.

Q. How about his mental condition?

(Deposition of Mrs. Frank Donahue.)

A. He was very good.

Q. Did you have occasion to see William Mahoney during the time he was in the army service?

A. No, not while in the service.

Q. Well, was he home at any time?

A. Yes, he was home on a furlough.

Q. When was that? A. January, 1920.

Q. Did you see him at that occasion?

A. Yes, I did.

Q. What was the reason for his coming home?

A. On account of Father's death.

Q. And how long was he home on that furlough?

A. Well, he was home about three weeks. [51]

Q. About how often did you see him during that furlough?

A. Well, I saw him nearly every day.

Q. What if anything did you observe about Mr. Mahoney's appearance or condition when he first came home on that furlough?

A. He was very nervous and quarrelsome and seemed to be afraid of something,—I just don't know what it was—and his mind seemed to be rambling. He would carry on a conversation, he would ramble and never could stay on one thing at a time, subject.

Q. What if anything was he wearing in addition to clothes at that time?

A. He was wearing a brace, a steel brace.

Q. On what part of his body?

A. From his neck down to the—all down along

(Deposition of Mrs. Frank Donahue.)

his spine and all though his—around his body, braced around.

Q. How low did that brace come, do you know?

A. Well, clear down to the end of the spine.

Q. Did you notice anything about his color?

A. He was very pale.

Q. And how about his strength?

A. He had no strength at all. He wasn't able to dress himself and shave himself or get around without any help. We had to help him.

Q. Well, what about his walking?

A. He walked very slow and stooped, or just could hardly get around.

Q. Let's see, did you testify about whether or not he dressed himself?

A. No, he didn't dress himself.

Q. I believe you testified you had occasion to observe him practically every day for that period of three weeks? A. Yes, I did.

Q. Would you have an opinion as to whether or not his mind [52] was affected at that time?

A. Yes, I should say it was.

Q. When did you next see your brother, Mr. Mahoney?

A. Well, on this trip is the first time I saw him.

Q. Well, where did he return after his discharge from the Army?

A. Well, he returned to Minot.

Q. Did you have occasion to see him then?

A. Well, I saw him just for a short time, but I

(Deposition of Mrs. Frank Donahue.)

had left there for some time on account of my health, so I——

Q. (Interrupting): Well, where did Mr. Mahoney return after he got out of the Army?

A. He returned to his home.

Q. In Minot? A. Uh-huh.

Q. Were you in Minot at that time?

A. Yes, I was.

Q. And how long did you stay in Minot before you left?

A. Well, it was just about a month or so, then I went on a trip.

Q. Did you have occasion to see Mr. Mahoney during that time? A. Yes, I did.

Q. Would you state what you observed about his physical and mental condition at that time, physical and mental appearance at that time?

A. Well, I didn't see much improvement over the time he was on furlough.

Q. Well, what about his conversation, for instance?

A. It was very rambling and uncertain, never could stay on one subject.

Q. What else did you observe?

A. That he was very quarrelsome and hard to get along with.

Q. What did he do with his time when he first got home?

A. Well, he didn't do anything; just laid around for a while.

(Deposition of Mrs. Frank Donahue.)

Q. How long were you away on this trip? [53]

A. Seven weeks.

Q. Did you return to Minot then?

A. Yes, I did.

Q. And when did Mr. Mahoney leave Minot?

A. Well, that I just can't recall, when he left.

Q. Was he still there when you returned?

A. No, he was not.

Q. You say you haven't seen Mr. Mahoney until this visit this year?

A. Not until this visit.

Q. What have you observed about him on this trip to Portland, Oregon?

A. Well, I really think that he is in a very poor condition. That is, I don't see much change in the condition before.

Q. What about his conversation?

A. He still can't carry on a conversation with anyone. He wanders. You have him on one subject and he will be discussing something else; he seems to be wandering some place else.

Q. Now, would you compare that with what it was when you saw him on this furlough and when you saw him when he first got out of the army and returned to Minot?

A. Well, his physical condition now, he looks a little bit better, but not much improved in conversation and in mind.

Q. Would you compare your testimony about being quarrelsome and hard to get along with now and what it was when he first returned?

(Deposition of Mrs. Frank Donahue.)

A. Yes, I will.

Q. What would you state it was?

A. Well, it was the same thing. He is very hard to get along with and is very nervous and everything upsets him very easily.

Q. Has he ever expressed any feelings with regard to what others thing about him? [54]

A. Well, he thinks everyone is down on him.

Q. Now, is that the condition today or when you first saw him?

A. Well, he has always felt that way. When he first came out of the army he felt that someone was always trying to do him wrong.

Q. When he came home at the time of his father's death, on this furlough, was there any occasion for other members of the family to depend upon any actions of his to do anything?

A. Well, his brothers had to wait on him, dress him and undress him, shave him.

Q. Oh, Mrs. Donahue, when did your father die?

A. Well, it was in 19—did I say 1920 or 19——

Q. (Interrupting): Well, I don't think I asked you. I am trying to fix the date of this furlough when he was home.

A. Well, it was in 1919, I think, Father died, if I am correct.

Q. For your information, the record will show that Mr. Mahoney entered the service on July 13, 1917 and was discharged therefrom on May 22, 1920. Now can you recall just about how long it was

(Deposition of Mrs. Frank Donahue.)

when he was home on a furlough before he was discharged in May of 1920?

A. No, I can't recall.

Q. You don't recall whether it was 1919 or 1920 that your father died?

A. It was 1919, the furlough.

Q. Now, would you compare this condition of being nervous and quarrelsome and suspicious, his mind wandering, his conversation rambling and disconnected, with what it was before he went into the army?

A. Oh, he was strong and well before he went into the army. He didn't have any rambling conversation then.

Q. Well, did he have any of these symptoms of mind wandering, talking about his troubles, rambling, and disconnected conversation, and being suspicious of other people, and being nervous, before he went into the army? [55]

A. No, he did not.

Q. Now, after your brother's discharge from the army how soon did you notice these things that you testified to about his mental condition?

A. Well, he has always been that way since he has been discharged that I have saw him.

Q. Oh, was your brother still in uniform when he came home to Minot?

A. Well, not after he was discharged.

Q. Do you know how soon he came home after his discharge?

A. Well, that I don't know. I can't recall.

(Deposition of Mrs. Frank Donahue.)

Q. Do you recall what month in the year it was when he came home after he got out of the army?

A. No, I don't. I can't recall that, either.

Q. Well, do you recall the season of the year, whether it was spring or summer or fall?

A. Well, I think it was in the summer sometime, but just what month I don't know.

Mr. Meindl: I believe that is all.

Cross-Examination

My Mr. McGan:

Q. Is your brother younger or older than you are? A. He is younger than I am.

Q. How much?

A. He is about three years younger.

Q. Were you married at the time that he went to war? A. Yes, I was.

Q. Were you living at home?

A. No, I was not living at home. I was living in Minot.

Q. But you were not living at the same place?

A. No, not at the same house.

Q. You were home every day, were you?

A. Yes, I was.

Q. And did you see his brother shave him? [56]

A. Well, I didn't see him shave him but I know that he took care of him, took off his clothes and——

Q. (Interrupting): How do you know that?

A. Well, I was there at one occasion when I saw them getting him ready for bed, but——

(Deposition of Mrs. Frank Donahue.)

Q. (Interrupting): And that is all? Just the one time? A. Yes.

Q. You didn't know anything about any other time?

A. No, because I wasn't at home. I had a home of my own to take care of.

Q. Did you see him shave him at all?

A. No, I did not.

Q. You don't know whether they shaved him or not, then?

A. Well, I am positive that they did, because he——

Q. (Interrupting): How are you so positive?

A. Well, he was not able to raise his arms or get around.

Q. Just answer my question: How are you so positive? Did somebody tell you they shaved him? Is that right?

A. Well, my oldest brother done the shaving.

Q. How did you know that?

A. Well, he said he did.

Q. That is right. Now, the same way with the dressing and undressing? A. Yes.

Q. They told you about that. Then when he came home from the army and was finally discharged you were there very little, is that right?

A. Yes, that is right.

Q. You saw very little of him, is that right?

A. I didn't see very much of him, no.

Q. You had taken your leave from Minot before he got home, had you not?

(Deposition of Mrs. Frank Donahue.)

A. Yes, I had.

Q. Then you returned there? [57]

A. Yes, after seven weeks.

Q. And how long did you stay after you returned?

A. Well, I stayed there permanently then.

Q. You stayed there permanently?

A. Yes.

Q. And he left, is that right? In the meantime he had left? A. Yes, he had.

Q. And then you didn't see him again?

A. No, not until this trip.

Q. Until this time; so you know nothing about his condition—you know nothing about him of your own knowledge between the time of his discharge from the army——

A. (Interrupting): Well, from just what I saw him just on one or two occasions after——

Q. Interrupting): How long a time did you see him after he was discharged?

A. Well, I couldn't recall that.

Q. Very long, Mrs. Donahue? That is, several days, or just for a visit?

A. Well, on some occasions just when I would go up home, or something like that, he might be in there or he might not.

Q. And how often do you think you saw him? Two or three times, or more?

A. After he was discharged?

Q. Yes.

(Deposition of Mrs. Frank Donahue.)

A. Well, I didn't see him until after I came back, and that was once I saw him.

Q. And you just saw him the one time?

A. One time.

Q. After his discharge. Now, if you can recall, how long did you see him that one time?

A. Well, I don't recall that. I couldn't answer that positively.

Q. Well, you don't have to and I don't expect you to, after this long a time has elapsed. Just give me your best recollec- [58] tion.

A. Well, I was gone away when he was discharged and he left before I got back, so I couldn't recall anything, and I was in very poor health and wasn't around as much as—at that time.

Q. Am I to understand your testimony that when he was discharged and came home you had left?

A. Yes, I had. I had left Minot before he was discharged.

Q. And then before you got back he left?

A. He left.

Q. So, as a matter of fact, you did not see him at all, after his discharge?

A. No, not after his discharge; just while he was home on a furlough.

Q. You never saw him—after you saw him on that furlough you never saw him again until last Friday? A. Last Tuesday.

Q. Or last Tuesday, I beg your pardon. Now, is that correct? A. Yes, sir.

(Deposition of Mrs. Frank Donahue.)

Q. That is your testimony here. Very well, so you know nothing about his condition after he was discharged from the army?

A. No, I don't.

Q. You have no knowledge of any of—These things that you have testified to here all occurred before his discharge? A. Yes.

Q. And at the time he was home it was to attend and assist in the burial of your father?

A. Yes.

Q. How many brothers and sisters are there in the family?

A. There's just four brothers. I am the only girl.

Q. And are they all resident in Minot?

A. Not now, no.

Q. Where do they live? [59]

A. One lives at—John lives at Milwaukee, Wisconsin, and James E. lives at Seattle, Washington, and Francis lives at Everett, Washington.

Q. I see. Now, which one of the brothers was home when he was discharged from the army, if you know?

A. Well, they were all home. My oldest brother was home and he moved away, after he went back on a furlough, he moved to Milwaukee—or to Hibbing, Minnesota.

Q. And, of course, the parents were living there, were they? Were they living there?

A. Just the mother.

Q. Is she still alive?

(Deposition of Mrs. Frank Donahue.)

A. No, she is dead.

Q. Do you have the addresses of these brothers that lived at Minot when your brother was discharged? A. Yes, I have.

Q. Will you give them to the reporter, please?

A. Do you want the street addresses, too?

Q. Yes, if you have them.

A. John Mahoney, 2319 West State Street, Milwaukee, Wisconsin; and J. E. Mahoney, 124 Warren Avenue, Seattle, Washington; and Francis Mahoney, 2130 State Street, Everett, Washington.

Q. You were ill at the time your brother came home for the furlough? A. Yes, I was.

Q. When he came home for the furlough?

A. Oh, not when he came home for the furlough, no.

Q. You were in good health at that time?

A. Yes.

Q. And saw him every day, did you?

A. Yes, every day.

Mr. Meindl: Is that all?

McGan: Yes. [60]

Mr. Meindl: I believe no further questions.

Redirect Examination

By Mr. Meindl:

Q. Say, there is one question, just to clear that up: Mrs. Donahue, the testimony that you gave on direct examination about your brother's appearance and actions had reference to the time he was home on a furlough, is that correct?

(Deposition of Mrs. Frank Donahue.)

A. On a furlough?

Q. It had no bearing on the time he came home after he was discharged from the army, is that it?

A. No, I didn't see him then.

Mr. Meindl: That is all. [61]

Mr. Meindl: We now offer the depositions of J. A. Hennessy, Walter Dooley, and A. E. Abbott, witnesses taken by the plaintiff in Minneapolis, Minnesota on May 25, 1942.

Mr. McGan: What is the number of that exhibit?

Mr. Meindl: It is Pre-Trial Exhibit No. 6. [62]

(The depositions of J. A. Hennessy, Walter Dooley, and A. E. Abbott, Plaintiff's Pre-Trial Exhibit No. 6, were then read to the jury; said depositions, omitting all formal parts, are in words and figures as follows, to-wit:)

A. E. ABBOTT

a witness of lawful age, having been first duly sworn by the Notary Public, testified as follows:

Examination by Mr. Meindl:

Q. Would you state your name, please?

A. Albert E. Abbott.

Q. Where do you live?

A. 4835 First Avenue South.

Q. In Minneapolis, Minnesota?

A. That is right.

Q. What is your occupation?

(Deposition of A. E. Abbott.)

A. Bookkeeper.

Q. For what company?

A. Northern States Power Company, 15 South 5th Street.

Q. Here in Minneapolis?

A. In Minneapolis.

Q. Mr. Abbott, how long have you been with the Northern States Power Co.?

A. 21 years.

Q. Were you ever stationed with that company in Minot, North Dakota? A. Yes.

Q. When did you start to work for them in Minot? A. Permanently?

Q. Both. A. February, 1921.

Q. Are you acquainted with William V. Mahoney, the insured in this case?

A. Yes, to the extent that I worked with him at the time he was employed at Northern States Power Company. [63]

Q. Where and when was that?

A. Minot, North Dakota—Northern States Power Company—February, 1921 up to the time he left the company.

Q. Do you recall about when he left the company?

A. Well, I wouldn't have known him over six to eight months.

Q. What was your capacity with the company there in Minot when you knew Mr. Mahoney?

A. I would say collections and assistant storekeeper.

(Deposition of A. E. Abbott.)

Q. Were you in the office then?

A. That is right.

Q. What was Mr. Mahoney doing for the company?

A. He was more or less errand boy, or office boy doing odd jobs around the office such as file clerk and making addressograph plates for accounts receivable customers.

Q. I take it Mr. Mahoney was not under your direct supervision? A. That's right.

Q. Did Mr. Mahoney have a nickname in that office? A. Yes, he did.

Q. What was it?

A. I don't know if any one called him this nickname directly to his face but they called him "Dizzy Mahoney."

Q. Mr. Abbott, will you explain about that nickname of "Dizzy Mahoney" and explain as to who called him that? If——

A. He was commonly known among the employees as "Dizzy Mahoney," and whenever you wanted him you would ask someone "Where is Dizzy Mahoney?"

Q. Mr. Abbott, would you testify and explain the activities of Mr. Mahoney during the time you were employed together?

A. If you had an errand for him to run such as getting change from the bank——

Q. Mr. Abbott, would you confine it to your personal observation as to how Mr. Mahoney acted there at the Northern States Power Company?

(Deposition of A. E. Abbott.)

A. If you were looking for Mr. Mahoney to do some errand you would usually find him in some out-of-the-way place amusing himself by either looking out the window or playing with some small object in his hands such as an eraser or pencil. This was more the case than not.

Q. What do you mean by more the case than not?

A. You wouldn't find him where you would expect him, writing addressograph plates or doing some work he was assigned to.

Q. Did you ever notice anything about his mental state, and by that I mean what his state of mind seemed to be?

A. He was peculiar.

Q. On what do you base the conclusion that he was peculiar? What made you think that, Mr. Abbott?

A. Inasmuch as he was by himself, particularly didn't want to associate with fellow employees.

Q. Mr. Abbott, did he associate with his fellow employees in the office?

A. To the extend he did the work assigned to him, and if you [64] wanted him look for him and give him another job and he would complete that.

Q. How about the other times?

A. He was by himself.

Q. Mr. Abbott, did you know Mr. Mahoney before he went into the army? A. No, sir.

Q. Have you ever had occasion to see him since he left Northern States Power?

(Deposition of A. E. Abbott.)

A. No, sir.

Q. Are you acquainted with a party by the name of Slocum who worked for Northern States Power? A. Yes, sir.

Q. Have you any recollection of an incident occurring between Mr. Slocum and Mr. Mahoney?

A. No, sir.

Cross Examination

By Mr. Lytle:

Q. Mr. Abbott, about how old were you in February, 1921? A. 23½.

Q. About how old was Mr. Mahoney when he came to work there, or when you first knew him while working there in February, 1921?

A. I should judge 24 or 25 years old.

Q. You don't know of your own personal knowledge what his earnings were—I mean of your own personal knowledge, not what you heard?

A. No, I don't.

Q. I think you say you first became acquainted with him in February, 1921?

A. That is right.

Q. And then you knew him for six or eight months? A. That is right.

Q. And then he left there after six or eight months?

A. Something about that time. I have been employed with the [65] company since February, 1921 continuously.

Q. Where was your desk in relation to his desk, Mr. Abbott?

(Deposition of A. E. Abbott.)

A. When I was going collections, I just had a place to come to and check in—not a desk. I didn't have a permanent desk as I recollect. He had a table in the addressograph room.

Q. Were you doing collections during all this six or eight months? A. No.

Q. As assistant collector were you out part of the time? A. Yes, sir.

Q. How much of the day would you be about?

A. Average half a day.

Q. You didn't know what he was doing half the day—that is, of course, on personal observation? A. No, sir.

Q. What part of the six or eight months that you knew Mr. Mahoney were you assistant storekeeper?

A. Approximately five months.

Q. You say he had no designated desk or location?

A. That is right. This is 21 years ago.

Q. What significance would that have?

A. It is a long time ago—you forget things in the past—lots of things I can't remember.

Q. Mr. Mahoney wasn't under your supervision at all? No, sir. None whatever.

Q. Are there any other people here with the Northern States Power Company, employed here in Minneapolis, who were employed in Minot at that time?

A. I know Mr. J. A. Hennessy. I hired out under him.

(Deposition of A. E. Abbott.)

Q. He is here today? A. Yes, sir.

Q. Who else? A. W. C. Dooley.

Q. Who else? [66] A. That's all.

Q. And they are the only persons employed by Northern States Power now?

A. At that time? I know others——

Q. I mean at that time—who else was employed in the office at that time who are not here?

A. You mean who are here now?

Q. No, who else was employed in the office when you were? A. P. J. Montgomery.

Q. Where is he? A. He is here.

Q. He was employed in the office at that time?

A. Yes, sir.

Q. He is not employed with the company though? A. Yes, he is.

Q. Who else, Mr. Abbott?

A. There was a man who was out there for about two years who is down here now, but he wasn't there at the time Bill Mahoney was there.

Q. Who else was there when Mahoney was there? A. My brother was there.

Q. What is your brother's name?

A. Raymond F. Abbott.

Q. Where does he live?

A. Minot, North Dakota.

Q. Who else?

Q. J. F. McGuire, Manager out there at the time.

Q. Where is he now?

(Deposition of A. E. Abbott.)

A. Fargo, North Dakota.

Q. Who is he with at Fargo? The same company? A. Yes, sir.

Q. Who else?

A. H. R. Slocum. In the capacity of job foreman.

Q. Where is he now?

A. He is with a utility, an electric utility in South Dakota. [67]

Q. Do you know where?

A. He was in Hot Springs but has *has* been transferred—I don't know—I believe it is Columbus, Nebraska. I think it is Central West or Midwest Utilities.

Q. Who else, Mr. Abbott?

A. Blanche Callahan.

Q. Where is she?

A. Northern States Power at Minot.

Q. Whereabouts at Minot?

A. Minot, North Dakota. You mean her capacity?

Q. I don't need her capacity. Anyone else?

A. Not in the office?

Q. No, in the office.

A. Florence Callahan, sister of Blanche, Minot, North Dakota. She has been married since. I don't recall her name now. Trying to think of another fellow that was there. J. A. Hennessy, I gave you that—Walter Dooley. Comparatively small office at that time. Let's see there was another girl there—Iva Brundage. She has since married.

(Deposition of A. E. Abbott.)

Q. Where does she live?

A. Lives in Minneapolis.

Q. You don't know her name?

A. Yes, Mrs. W. C. Dooley.

Q. This (pointing) Mr. Dooley's wife?

A. Yes, sir. She was a stenographer.

Q. Who else?

A. There was a George E. Balch who was General Superintendent.

Q. George E. Balch?

A. Yes, he was General Superintendent at the time.

Q. Where is he?

A. I don't know. My brother worked there. Another brother of mine, but he wouldn't—still he was there at the time—seems to me he was in and out. He was going to school. I am quite sure he was there at the time. [68]

Q. What is his name?

A. Dr. G. A. Abbott. Do you want his address?

Q. Yes.

A. Stapleton, Staten Island, New York. U. S. Marine Hospital.

Q. That is all?

A. Yes—no, I have still another one—Irene Belanger. She was toll clerk; billing of the toll to customers.

Q. Where is she?

A. At Minot when I left there.

Q. How long ago was that?

(Deposition of A. E. Abbott.)

A. June 30, 1941—but not with the Northern States on June 30, 1941.

Q. Who was she with then?

A. With the bus company. I can't think of the name of the bus company.

Q. There is only one bus company there, isn't there?

A. No, I think there is a couple.

Q. Employed by a bus company?

A. That's right.

Mr. Lytle: I think that is all.

WALTER C. DOOLEY

a witness of lawful age, having been first duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Meindl:

Q. Would you state your name, please?

A. Walter C. Dooley.

Q. And where do you live?

A. 4340 Wooddale Avenue.

Q. Minneapolis? [69] A. That's right.

Q. And what is your occupation?

A. I am statistician at the Northern States Power Company.

Q. Here in Minneapolis? A. Yes, sir.

Q. How long have you been with the Company?

A. I was with them 21 years last—just a mo-

(Deposition of Walter C. Dooley.)

ment, I started in October, 1921, so I will be with them 21 years this October.

Q. Were you ever stationed at Minot, North Dakota, with that Company?

A. Yes, I was.

Q. Are you acquainted with William V. Mahoney? A. Yes, sir.

Q. When did you first meet him?

A. In October, 1921.

Q. Mr. Mahoney was already working there then at the time? A. He was.

Q. What was your position at Minot, North Dakota, with the Company?

A. The storekeeper.

Q. Where was the store room located?

A. The storeroom was directly beneath the general office upstairs.

Q. Do you recall how long Mr. Mahoney stayed with the company after you went there?

A. I believe it was about three months after I started to work. I think it was along the first of the year he left.

Q. Was Mr. Mahoney under your supervision or direction? A. No, he wasn't.

Q. Did you ever have occasion to see Mr. Mahoney after he left the company?

A. No, I haven't.

Q. Now, Mr. Dooley, would you tell us what you noticed and observed yourself about Mr. Mahoney and his actions while with [70] the company during that few months?

(Deposition of Walter C. Dooley.)

A. Yes, during the time I was there, as I remember, his duty was that of an office boy in a general way. We had no janitor. There was a Jap boy used to come and do the cleaning up, and the reason I am bringing this out was that one of Bill's duties was to do some cleaning up that was necessary during the day, and he would install light bulbs and different odd jobs like that, and as I remember it, I don't recall whether he *though* it beneath his dignity to do it, or whether it was distasteful to him as being looked down on, but I do recall that he would come down to the store room, apparently to get away from that. As I say, the general superintendent had an office in the basement, not the general superintendent by the way, he was the general superintendent's assistant. He would apparently come down there to keep away from them upstairs, and I suppose I sympathized with him as I knew he was bent over— He seemed to be physically handicapped—let's put it that way—and because he was an ex-service man, I probably sympathized with him. I suppose that is why he came down—that is the essence of what I wanted to say anyway. I don't know. I haven't much recollection of what I can add to that.

Q. Did you ever notice how he amused himself about the place? That is, how he spent his time?

A. Well, no, Bill was—I wouldn't call him very friendly. I don't think he did much associating—

(Deposition of Walter C. Dooley.)

only those times he came to me for sympathy because, as I say, he was apparently physically handicapped, I gave him that sympathy. I don't think I did much associating with him, so that I could really make a statement as a matter of fact. If I could describe this basement—the stairway came down from the main floor about three-fourths of the way back—the front part was a storeroom; in the rear, the assistant superintendent had a desk and, the stairway being partially enclosed, he would come down and get [71] on the side away from me. The assistant superintendent was out much of the time. They would send the men out to work and he would go out; then, the rest of the time that portion of the basement was not occupied, and Bill would spend his time there, or he would come in and hide in a vault there so people could not come and find him. As for his sitting down near me, or me watching *me* amuse himself, or pass away the time, I can't honestly say I knew how he did it.

Q. Mr. Dooley, did he associate with the other employees in the office?

A. My answer to that would be definitely "no".

Q. Do you remember an employee by the name of Slocum? A. Yes, I do.

Q. Do you recall any incident occurring between Mr. Mahoney and Mr. Slocum?

A. Yes, sir.

Q. Confine yourself to your own personal knowledge or observation.

(Deposition of Walter C. Dooley.)

A. May I bring out that Slocum was the assistant superintendent? The assistant who had the desk in the back part of the basement. Any number of times because my store room office was right close to that office, I heard some rather heated argument. Slocum, I would say two-thirds of this argument was kidding Mahoney and perhaps picking on him because he was easily picked on; but I recall one incident—after some heated words the manager, Mr. McGuire, told Mahoney—this was all in my presence—that he had better lay off Slocum who weighed about 250 lbs., and we were all amused about Mahoney replying that he would cut Slocum down to his size.

Q. What did Mahoney weight at that time?

A. He was about my size. If I could make a guess, about 130 or 135 lbs.

Q. Mr. Dooley, I wish to ask you if Mr. Mahoney ever made any [72] statements to you indicating how he felt other people felt toward him?

A. Yes, there was in Minot—we owned the telephone system and the head operator was Miss Brogan. Mahoney seemed to think she had a violent dislike to him, and he thought——

Q. What was her name?

A. Her name was Brogan—Fran—I don't recall her first name—I am sure that was right. There was another girl in the office, a Miss Tice, that Mahoney seemed to think disliked him very much. I don't recall that he thought any of the men with

(Deposition of Walter C. Dooley.)

the exception of Slocum was picking on him, but those women he seemed to think they were out to get his job, get rid of him, or make life miserable for him, and he would be better off to leave.

Q. Did Mr. Mahoney have a nickname there in the office?

A. Not to my knowledge. I always called him Bill.

Q. Is there anything else you can testify to that you observed about Mr. Mahoney and his actions? Anything unusual about his actions?

A. No, I can think of none right offhand that I haven't given in a general way.

Mr. Meindl: You may *close* examination.

Cross Examination

By Mr. Lytle:

Q. Mr. Dooley, how old was Mr. Mahoney at the time you worked with him during those three months you knew him after October, 1921?

A. Well, I was 22 and it was my thought—he was very bent over and I might have added to it—I thought about 25 years.

Q. And he had an injury? Something wrong with his back? A. Yes.

Q. That was the reason you sympathized with him?

A. Frankly, we were both ex-service men; that is why I sympathized with him. [73]

Q. You said he was physically handicapped; that there was something wrong with his back. What kind of physical handicap was that?

(Deposition of Walter C. Dooley.)

A. He was bent over and he complained about the pain in his back.

Q. You say your office was one floor below the general office? A. That's right.

Q. And you would see Mr. Mahoney when he came down to your office? A. That's right.

Q. You did not see him up in the general office?

A. Oh, yes, on a number of occasions I would go up, and I would see him.

Q. How many times a day would he come down to your office?

A. Probably an average of three or four times a day.

Q. What would he be doing in the main office when you went up?

A. In the back part of the office there was a small room in which they had an addressograph. I believe there was also a cloak room in this room where they had the addressograph. He ran the addressograph plates out for the bills they sent out. They used to send him after the mail, and I would see him do general chores they might ask him to do. Someone might want him to do some little thing around the desk or something like that.

Q. He ran errands too? A. Yes.

Q. Did he come down to your office on errands?

A. Yes, sir. I kept quite a supply of stationery down there and electric light bulbs, and they would send him down there after those things. In the day-

(Deposition of Walter C. Dooley.)

time he was, after a fashion, sort of a janitor around there. It wasn't a big office—probably 1-2-3-4-5, maybe about eight people in the place, so it wasn't a large office, but to install those light bulbs or get stationery or supplies from the basement, they sent Bill down repeatedly. [74]

Mr. Lytle: That is all.

Mr. Meindl: That is all, Mr. Dooley.

J. A. HENNESSY

a witness of lawful age, having been first duly sworn by the Notary Public, testified as follows:

Direct Examination

By Mr. Meindl:

Q. Would you state your name, please?

A. John A. Hennessy.

Q. And where do you live, Mr. Hennessy?

A. At the present time I live at 5316 Grand Avenue, Minneapolis, Minnesota.

Q. Minneapolis, Minnesota. And what is your occupation?

A. Auditor of stores and garages for Northern States Power Company.

Q. How long have you been with the Company?

A. Since 1913.

Q. Were you ever stationed at Minot, North Dakota? A. Yes, sir.

Q. Are you acquainted with William V. Mahoney the insured in this case?

(Deposition of J. A. Hennessy.)

A. I have a very clear recollection of Mr. Mahoney at the time I first worked with him. I first knew him just to say "hello" around town—it seems to me prior to the war but I wasn't personally acquainted with him at that time. I really became acquainted with him after the war.

Q. Where did you get acquainted with him then?

A. Of course, Minot was not a large town. I became acquainted with him through the American Legion and ex-service men activities.

Q. Mr. Mahoney was employed by your company as I understand it?

A. Yes, sir, he was. [75]

Q. What was your capacity at the time?

A. I was chief clerk in the accounting office in Minot, North Dakota.

Q. You had the supervision and control of Mr. Mahoney's work?

A. There was a statistician, our accountant, who was my immediate supervisor, but I to a great extent directed his work and had charge of his activities.

Q. Mr. Hennessy, would you tell the court and jury what you noticed and observed about Mr. Mahoney when he was employed under you there in Minot?

A. Should I go into length in the question?

Q. Yes.

A. When he came to work for us he was one of the boys about town who came back from the army and our post was trying to place everyone

(Deposition of J. A. Hennessy.)

who had connections with the war and I, personally, knew him at that time. He came to work for us as a meter reader, and when he wasn't reading meters he was a general office man doing messenger or office boy work, working on the addressograph and running errands, and various things of that kind. His work was satisfactory to a certain extent, but he had a peculiar temperament. My Recollection is that anything I gave him to do, he would do; he was honest and conscientious. As soon as he had done what he was told to, he was hard to find; he would more or less leave the office—not the building—you would have to go and find him.

Q. Where would you find him?

A. Various parts of the building—in the basement at the front, and on the second floor.

Q. What would he be doing?

A. Just sitting and apparently thinking, kind of a blank expression on his face; but you would call him and he would be right back on the job again.

Q. Would you state as to the frequency of that hiding out?

A. I couldn't say. Of course, when he was reading meters, he [76] would do a definite job at this. That would be about a week out of the month and then we would use him for a general office boy, and he wasn't around except when you went and found him.

Q. How about in reference to the accuracy of his work?

(Deposition of J. A. Hennessy.)

A. He was a very good meter reader. I don't recall any complaints about the accuracy.

Q. How about his other work?

A. We didn't put him on work requiring accuracy. We would put him on errands, etc.

Q. Tell us about whether or not he associated with the other employees?

A. He was pretty much of an "aloner". He would visit with the other employees occasionally. He wasn't entirely alone but, unless he had something definite to talk about, he didn't hang around with the other employees at all.

Q. Did you ever observe Mr. Mahoney when he din't realize that he was being observed?

A. I don't think I ever did except when I would go looking for him, and find him staring out the window or staring into space.

Q. Mr. Hennessy, did you ever hear him express his thoughts with regard to what the other people in the office were thinking?

A. He was difficult to handle. He seemed to take prejudice against certain people and I told him not to mind them, but he didn't come to me with troubles much. He didn't confide in me much.

Q. Just one question. You have testified about service men. Are you a service man yourself?

A. Yes, I am.

Q. Would you tell the court and jury if this fact had anything to do with employing Mr. Mahoney?

(Deposition of J. A. Hennessy.)

A. I think that it had a lot to do with my putting him to work and keeping him working. In those days we were very sympathetic towards each other and tried to help each other, and I [77] would say it had considerable to do with both.

Q. Mr. Hennessy, in the absence of sympathy or feeling about being a world war veteran, would you now hire a man of the capacity Mr. Mahoney had at the time Mr. Mahoney worked for the company?

A. I would not personally and, of course, our company rules are more stringent than they were in those days, even though my sympathy were with him.

Mr. Meindl: You may cross examine.

Mr. Lytle: I don't think there is any cross examination. Yes, I do want to ask one or two questions of cross examination.

Cross Examination

By Mr. Lytle:

Q. You said you employed Mr. Mahoney after the war, Mr. Hennessy? A. Yes, sir.

Q. When did you employ him?

A. It was in the spring and summer of 1920 to the best of my knowledge.

Q. How long did he work for you?

A. He worked for us for over a year and he left our employ at that time—if I may add—with a distinct feeling of relief on my part. He left us in the summer or fall of 1921 at which time he

(Deposition of J. A. Hennessy.)
was sent West, or went West, at least he left Minot at that time.

Q. He wasn't discharged, was he?

A. Oh, no.

Mr. Lytle: That is all. No further questions.

[78]

The Court: Ladies and Gentlemen, the court will be in recess for a few moments.

(A recess was then taken, after which proceedings were resumed as follows:)

Mr. Meindl: If your Honor please, we now offer the deposition of John J. Mahoney, a deposition of a witness in behalf of plaintiff, the deposition having been taken at Milwaukee, Wisconsin on May 27, 1942, and in view of the fact, your Honor, that there is only one deposition it is agreed that we should read the questions and answers here. [79]

(The deposition of John H. Mahoney, Plaintiff's Pre-Trial Exhibit No. 5, was then read to the jury; said deposition, omitting all formal parts, is in words and figures as follows, to-wit:)

JOHN H. MAHONEY,

being first duly sworn on oath by Charles D. Ashley, Notary Public in and for Milwaukee County, Wisconsin.

Examination by Gerald J. Meindl:

Q. Would you state your name, please?

(Deposition of John H. Mahoney.)

A. John J. Mahoney.

Q. Where do you live, Mr. Mahoney?

A. 2319 West State Street.

Q. In Wilwaukee, Wisconsin? A. Yes.

Q. Where do you work?

A. Lakewide Bridge and Steel.

Q. Here in Milwaukee, Wisconsin?

A. Thirty-two hundred something Villard Avenue—3200 Villard Avenue.

Q. Are you acquainted with the William V. Mahoney in this action? A. Yes.

Q. What relation, if any, is he to you?

A. Brother.

Q. Prior to the last World War, Mr. Mahoney, where were you living?

A. Minot, North Dakota.

Q. And where was your brother, the insured, in this case, William V. Mahoney, living prior to the last World War? A. Minot, North Dakota.

Let the record show that your brother entered the army on July 13, 1917.

Q. What was your brother doing before he went into the army?

A. He was working at odd jobs, was working mixing mortar. [80]

Q. Would you tell the court and jury what you noticed and observed about your brother's physical condition before he went into the army?

A. As far as I know, he was perfect, in good health. Everything was alright. He would have

(Deposition of John H. Mahoney.)

to be in good shape to do the work he was doing.

Q. Was he working or not working at the time he went into the army? A. He was working.

Q. Could you also tell us what you noticed and observed about your brother's mental condition prior to going into the army?

A. He was perfectly normal as far as I can see. He was in good health and in normal physical condition.

Q. Now, Mr. Mahoney, did you ever notice anything unusual about his actions prior to his going into the army? A. No.

Q. Mr. Mahoney, when did you first see your brother, as well as you can recollect, after he entered the army on July 13, 1917?

A. In January, the month of January, 1919.

Q. What was the occasion of your seeing him at that time? A. My father was dying.

Q. Where did you see your brother?

A. You mean what place?

Q. What I want, Mr. Mahoney, is for you to tell the court and jury what was the occasion of seeing your brother, where, what site, etc.

A. He came home when my father was dying at Minot, North Dakota in the month of January, 1919. You mean if I met him at the train?

Q. Was your brother still in the army service?

A. Yes.

Q. Now, if you would explain just where in Minot you first [81] saw your brother on this occasion.

(Deposition of John H. Mahoney.)

A. In the first place, I met him at the train.

Q. Did anyone else meet him outside of yourself? A. My brother, James.

Q. Now will you explain the happenings of that meeting?

A. Well, we sent him a wire to Fort Sheridan to come home, that my father was very low and the first word we got from him said he was in Minneapolis and will be home on No. 1 on a certain day. So my brother James and I went down to meet him. When the train pulled in the passengers were unloaded from the day coach—Well, when all the passengers got off the day coach and he wasn't there, I thought I would walk to the rear of the train toward the sleeper. As I walked back there a middle aged couple was helping him along the side of the train. He was walking with a cane and these two people were helping him, so we helped him into the depot and I said I would call a cab. It's no use, he said, I can't ride in a cab. I can't sit down. —So he says, 'don't call a cab, I'll have to walk.' So my brother James and I helped him to walk about four blocks, as far as the Hotel Leland—there we had to rest a while. So we rested about thirty minutes and then we continued on home, it was about five blocks.

Q. Now, Mr. Mahoney, at the time you met your brother, William, at the train and on this walk home, did he make any complaints to you?

A. He said his back hurt him, he was in terrible shape and very much pain.

(Deposition of John H. Mahoney.)

Q. Was there evidence of that pain in addition to his statement, I mean, by his expression, by his face?

A. Well, he could hardly walk, he was in awful pain and naturally, if in pain, your face is——

Q. Will you go ahead and tell what you noticed, any pain? [82]

A. Well, his face was long, aggravated so to speak.

Q. How long was your brother home there in Minot, North Dakota, on this furlough at this particular time?

A. In my opinion, about five or six weeks.

Q. Would you tell the court and jury what, if anything, you observed about his physical condition while he was home during that period?

A. Well, he was very irritable, nervous, cranky.

Q. Mr. Mahoney, about his physical condition, what, if anything, did you observe?

A. Well, he was all bent over, crippled up, he could hardly straighten up. He had a brace on and I had to help him put the brace on and take it off, help him with his trousers, shave him, and——

Q. Where was that brace on his body, on his back?

Let the records show that the witness demonstrated where the brace was by putting his hands around the middle of his back.

Q. Now, Mr. Mahoney, if you would tell the court and jury what, if anything, you observed

(Deposition of John H. Mahoney.)

about your brother's mental condition during this furlough?

A. Well, he was changed considerably since before he went over seas. He had a tendency to tease but was now very irritable and nervous; everything seemed to bother him; he was very touchy. My daughter was about three years old and she had some dolls she used to play with. He used to tease her all the time. She used to set these dolls up and he would knock them over.

Q. Did he ever do that prior to going into the army? A. No.

Q. Would you tell us how he seemed to react with regard to his association with other people?

A. Before he went over seas, he used to go to dances and drink a little, but when he was home he didn't seem to [83] care for anything.

Q. What did he do?

A. He just sat around the house and would listen, with a stare on his face. You would have to talk to him several times to get an answer out of him, you know.

Q. Did he associate with other people during this furlough?

A. Not much, he would go downtown once in a while and he would stay about twenty minutes and then wanted to go back home.

Q. Where did he stay most of the time during this furlough?

A. At home with my mother.

Q. And what would he do at home?

(Deposition of John H. Mahoney.)

A. He would just sit around the house and not carry on any conversation—just seemed to imagine everybody was bothering him,—somebody after him.

Q. Did you testify someone was after him? Would you explain on what you based that?

A. He would think someone was trying to—kind of hard to explain.

Q. Just in your own words, Mr. Mahoney, what would he say that made you believe that?

A. Well, I can't just explain that he was different.

Q. What, if anything, did you notice about his conversation?

A. Very rambling, he would be talking about one subject and switch over to something else—couldn't make head or tail.

Q. What, if anything, did you notice about his facial expression?

A. Well, he would sit and stare, dream, and didn't seem to want to talk to anyone.

Q. What, if anything, did you notice about your brother during this furlough in regard to his facial expression, particularly with reference to his mouth? A. I never watched it very close.

[84]

Q. Well, Mr. Mahoney, would you tell us whether you noticed, if anything, with regard to his temperament, that is was he sober?

A. He was sober, he was not jolly, kind of remorseful.

(Deposition of John H. Mahoney.)

Q. What, if anything, did you notice about his nervous condition? A. He was very irritable.

Q. Now, Mr. Mahoney, if you would compare what you noticed about his mental condition during this furlough as compared to what you noticed just priod to his going into the army?

A. Well, one thing I noticed. Before going into the army he was very liberal. When my father died the family wanted to hire another car or two for the funeral. I was a little short of cash and so we asked my brother. He said no, he would not take the money out of the bank. I thought this was very unusual because——

Q. Well, Mr. Mahoney, you have testified that during this furlough he and your young daughter —And further, you testified he was irritable, he did not want to be around people, that his conversation was rambling, and disconnected, that there was a vacant stare on his face and he felt people were against him, and he was nervous. Now, were any of these things present in his mental make up prior to going into the army? A. No.

Q. Mr. Mahoney, have you seen your brother, William, since this furlough? A. No.

Mr. Meindl: You may cross examine.

Cross-Examination

By William M. Lytle:

Q. Mr. Mahoney, you say he was home in January 1919?

A. To the best of my knowledge, I am not sure, 1919 or 1920.

(Deposition of John H. Mahoney.)

Q. Could it have been 1920? A. Yes.

Q. Could it have been 1921? [85]

A. I don't think so.

Q. Could it have been January 1918?

A. No, it could not.

Q. Well, had your brother been in—strike that.

Q. Did you know that your brother had an injury to his back while in the service? A. Yes.

Q. How did you know?

A. I didn't know that he had an injury until he came back from over seas because he never informed us that he was injured until he was in New York—that he was seeing the sights on a stretcher.

Q. Do you know when that was?

A. About the time the Armistice was signed.

Q. You mean—November 1918?

A. If I am not mistaken, I think so.

Q. Did you know when your brother arrived in New York? A. I can't say definitely.

Have the records show that he did not get back from overseas until May 1919.

Q. Do you still want the court and jury to understand that he came home on a furlough in January 1919?

A. It must have been 1920. I was mistaken because, as I said, I can't say definitely.

Q. Then, if that is true, do you think it might have been January 1920?

A. I think it might have been, but I am not positive.

(Deposition of John H. Mahoney.)

Q. Your memory is not as good as it was right after it happened, of course.

A. No, but am pretty positive it was in January 1920 because that was when my father died.

Q. Well, don't you know the year your father—— A. 1920.

Q. Sir? A. 1920. [86]

Q. So you were mistaken when you thought it was 1919 when your father died? A. Yes.

Q. Do you recollect the place and time of your borther's trip home on furlough because of the time your father was in the hospital?

A. Yes, but it may have been 1919 or 1920, I am not positive.

Q. Now, when your father came home on this furlough in January 1919 or 1920 at the time your father was dying in the hospital, you saw he was suffering with considerable pain from his back; as a matter of fact when you first saw him after the train came to a stop, several middle aged people were helping him—a middle aged man and woman. Did he have pain the whole time he was home, was he stooped over very much?

A. He stooped like this.

Let the records show that the witness demonstrated and was stooped over about 45 degrees.

Q. That's all, I think.

Mr. Meindl: That is all, Mr. Mahoney. [87]

Mr. Meindl: If your Honor please, the plaintiff

offers the deposition taken by the defendant as a defendant's witness at Seattle, Washington on June 29, 1942, the testimony of Francis Patrick Mahoney.

The Court: This is the one that has Exhibit 8-A attached to it, is it not?

Mr. Meindl: If your Honor please, not of this witness, no. [88]

(The deposition of Francis Patrick Mahoney, Defendant's Pre-Trial Exhibit No. 8, was then read to the jury; said deposition, omitting all formal parts, is in words and figures as follows, to-wit:

FRANCIS PATRICK MAHONEY,

was duly sworn to testify the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination

By Mr. McGan:

Q. You may state your name?

A. Francis Patrick Mahoney.

Q. You live in Everett, Washington?

A. Yes, sir.

Q. How long have you lived in Everett?

A. About 18 months.

Q. Are you any relative of William V. Mahoney? A. Yes; he is my brother.

Q. Where were you residing in 1920?

A. I believe in Minot, as nearly as I can remember.

Q. Minot, North Dakota?

A. Yes, Minot, North Dakota.

(Deposition of Francis Patrick Mahoney.)

Q. State, if you know, whether or not William V. Mahoney was living there at that time?

A. Well, I would not say to the date, you know, but he was living there, I think, at that time; I am not sure.

Q. Do you remember when William V. Mahoney was discharged from the Army?

A. No, I do not.

Q. Were you at Minot at that time?

A. No, I was not.

Q. Did you return after that? A. Yes.

Q. About how long after that? [89]

A. Oh, I don't know; I imagine about a year.

Q. Did you remain there for some time?

A. Yes. I stayed there, you know, I would stay three or four months and leave again.

Q. You saw your brother William during this period that you were home after he was discharged from the service? A. Yes, I believe I did.

Q. Do you remember whether or not he was living at home at that time?

A. No. He was living uptown in an apartment.

Q. You may state, if you know, whether or not he was employed at that time?

A. Why, he was employed at the — the only place that I ever knew he was employed was at the Consumer's Power.

Q. Was that at Minot, North Dakota?

A. Yes.

Q. Now, did you observe your brother, particu-

(Deposition of Francis Patrick Mahoney.)

larly with reference to any physical or mental condition he may have had when he got home from the service?

A. Yes. He was awfully nervous. You know, he wasn't the same as when he left; he was in a changed manner.

Q. Explain what you mean by that?

A. Well, his actions. He acted funny, you know, and nervous.

Q. Now, that word "funny" will not mean much to the jury, Mr. Mahoney. Just what do you mean?

A. Well, irritable and nervous.

Q. Was he irritable to the point of being unpleasant?

A. No, I would not say that. No*w*, he was not so unpleasant.

Q. How frequently would you notice his irritability?

A. I never say him very often—whenever I would see him.

Q. Would that be apparent every time you saw him?

A. Well, you know I can't—I don't remember, you know, [90] every time; but when I met him, you know, that is the way he felt—that is the way he acted.

Q. You may state whether you talked to your brother frequently during this period?

A. Yes, I have talked to him.

Q. Was his conversation intelligent?

(Deposition of Francis Patrick Mahoney.)

A. Well, in a way, and in another way it was not. He was, you know, he would kind of ramble off, start to say something and say something else.

Q. You say he rambled off. What do you mean by that?

A. Oh, he would talk about one thing, and maybe he would change to another.

Q. Did you notice anything else about him with reference to his mental characteristics or make-up at that time?

A. No, I can't remember anything else.

Q. Do you know whether or not he was ever in trouble on anything while he was at home while you were there?

A. No, he never was in trouble, I don't believe —that is, not while I was there.

Q. State whether or not he was, if you know, under the care of a doctor at that time?

A. Well, if he was, I never knew it.

Q. Will you, if you can, describe the appearance of your brother about that time?

A. Well, he was, you know out of shape. He had his back broke. He was rather thin from lying in hospitals.

Q. Did he keep himself clean?

A. Oh, yes, he kept himself clean.

Q. Was he always well dressed?

A. Yes, he was always well dressed.

Q. Do you, Francis, have an opinion as to whether or not your brother was sane or insane during this period?

(Deposition of Francis Patrick Mahoney.)

A. Well,—does it have to be sane or insane?

Q. Just answer the question, Mr. Mahoney.

[91]

A. Well, of course, you know I would not know about that, because——

Q. I asked you if you had an opinion, Mr. Mahoney. A. I think he was all right.

Q. Now, have you seen your brother William since he left Minot?

A. Yes, I seen him in Portland.

Q. Did you ever see him again in Minot after this first period of his presence?

A. Yes. He was back there once on a furlough.

Q. What do you mean by "furlough"?

A. Why, a vacation—just a vacation.

Q. And when was that time, if you recall it?

A. Do you mean after he was discharged?

Q. Yes.

A. Well, I do not remember what year it was.

Q. Do you know how he came back?

A. Why, I think he came back on the train, so far as I know.

Q. Was he accompanied by anyone?

A. I don't believe so.

Q. Particularly, I might say, was he accompanied by his wife?

A. No. His wife was not with him.

Q. Now, I will ask you what you know about his condition with reference to his mental health. What, if anything, did you notice about his mental health then?

(Deposition of Francis Patrick Mahoney.)

A. Well, he was more nervous than he was before.

Q. Did you observe any change in him at that time?

A. Oh, I observed that he was more nervous and touchy, you know, and cranky.

Q. Now, when did you next see William?

A. In Portland. [92]

Q. Do you remember what year that was?

A. I think it was 1937—in the fall of 1937.

Q. Did you notice or observe his condition with reference to his mental condition at that time?

A. Yes. He was just like he was last, only worse.

Q. Did he seem to you he was getting worse?

A. Yes.

Mr. McGan: That is all.

Cross Examination

By Mr. Meindl:

Q. Mr. Mahoney, when you saw your brother in Minot following the war, when was it your first saw him before that? How long had it been that you had seen him, and where?

A. Oh, that is when he was home on a furlough.

Q. While he was still in the Army?

A. While he was still in the Army.

Q. And what was the occasion of that furlough? That is, how did he happen to come home?

A. Well, he had come home on a visit, I think. That was about—I should say my dad died about

(Deposition of Francis Patrick Mahoney.)

that time, in 1920, and I don't know—I can't remember. He was there during the funeral or before that.

Q. Were you home at that time?

A. Yes, I was.

Q. Now, Mr. Mahoney, you testified that when you saw your brother after he got out of the Army, that he was awfully nervous; that he was not the same as when he left to go into the Army; that he was a changed man, queer actions, acted funny. Now, did you notice any of those things when he was home there on the furlough?

A. Well, when he was home on furlough, he was wearing the brace, you see, and he was sick. [93]

Q. Where did he wear the brace?

A. He wore it on his back.

Q. Did you see it?

A. Yes. I would take it off and put it back on.

Q. Would you describe the brace, please? How big was it?

A. Oh, it was—it went all the way around his body and up under his arms, you see, to hold his shoulders up, and it was buckled up, if I remember right, right along the sides, because it was so that he could not reach it to unbuckle it, even if he had wanted to. It was buckled somewhere in the sides.

Q. How did he carry himself at that time? How did he get along?

A. Well, he had—whenever he went out for a walk, I went with him. It was in the winter and it was slippery and he might fall down. It seems

(Deposition of Francis Patrick Mahoney.)

as though he had a cane; if he did go any place, you know, around the house, he had a cane. He had that brace on.

Q. Did he shave himself?

A. No, I shaved him.

Q. How about getting his clothes on?

A. I had to dress him and undress him.

Q. Do you remember how long he was at home at that time? A. Two weeks.

Q. Mr. Mahoney, did you notice that your brother was very nervous and irritable during that period of time, too? A. Yes, he was nervous.

Q. Did you notice that he kind of kept to himself?

A. Yes. He was in the house most of the time.

Q. Did he go out and associate with his friends?

A. No. When he was there at that time, it was winter and it was slippery, and whenever he would go any place, I would have to go with him to see that he would not fall [94] down.

Q. Did you notice that he was kind of suspicious with members of the family and other people?

A. Yes, he was kind of funny that way.

Q. Now, Mr. Mahoney, when your brother came out of the Army there in Minot and was with the power company there, where were you living?

A. I was living with my sister, I believe.

Q. Was your brother living at the same place?

A. No. He had an apartment at that time uptown.

Q. But how frequently would you see him?

(Deposition of Francis Patrick Mahoney.)

A. Oh, once every two weeks, I believe.

Q. When you saw him, did you notice that he was very irritable and nervous?

A. Yes, he was.

Q. Did you notice that he was suspicious of members of the family and other people?

A. Yes, he was.

Q. Did you notice that your brother was depressed and sad in his actions?

A. Oh, I would not say he was sad. He was hurt, you know, and he was not happy or anything like that.

Q. Did you notice that his conversation was rambling and disconnected?

A. Oh, it was a little funny, you know. He talked kind of funny at times, and sometimes he would talk all right.

Q. Was it different than it was before he went in the Army?

A. Oh, yes, it was different, yes.

Q. Did you notice an entire change of personality in your brother when he returned from the Army as to what it was before he went in the Army?

A. Yes.

Q. Now, the next time you saw your brother was back in Minot when he came there for a visit, as I understand it? [95] A. Yes.

Q. That was several years later, was it not?

A. Yes, I think it was '27; something like that.

Q. How long was he there that time?

A. About two weeks.

(Deposition of Francis Patrick Mahoney.)

Q. How frequently did you see him on that visit?

A. I see him about once or twice while he was there.

Q. Did you notice the same things then that you had noticed when he first came home from the Army? A. Yes.

Q. Now, the next time you saw him was in Portland, as I understand, about 1927 or 1928?

A. Yes, that is right.

Q. How long were you in Portland at that time?

A. About three months.

Q. Were living at the same place your brother was? A. No, I was not.

Q. About how often did you see him?

A. About once every two weeks.

Q. Did you notice the same things that you had noticed in North Dakota? A. Yes.

Q. When he first came home from the Army?

A. Yes.

Q. Have you ever seen your brother since that time?

A. Yes. I saw him in the hospital in Roseburg, Oregon, the last time.

Q. How many times did you see him down at the Roseburg Hospital? A. I saw him twice.

Q. That was the Veteran's Hospital, was it not?

A. Yes, it was.

Q. Now, would you tell us whether or not you noticed the [96] same things wrong with your brother there at the Roseburg Hospital that you

(Deposition of Francis Patrick Mahoney.)

had noticed when he first came home from the Army?

A. Yes, he was about the same, or worse.

Q. Now, Mr. Mahoney, counsel for the government asked you to give an opinion in regard to your brother's state of mind when he came home from the Army. Isn't it your opinion that there was something wrong with his mind when he first came home, that was different?

A. Well, he acted queer.

Q. But you don't hold yourself out as an expert as to whether a man is sane or insane, do you, Mr. Mahoney? A. Oh, no, I do not.

Q. But you did notice that something was different in the way he acted and the way his mind seemed to work, is that right?

A. Yes, his actions were different.

Mr. Meindl: I believe that is all.

Redirect Examination

By Mr. McGan:

Q. Mr. Mahoney, you testified on cross examination that you saw your brother in Portland in 1927 and 1928. Do you mean that, or did you mean to say 1937? A. In '37.

Q. '37 and 1938? A. Yes.

Mr. McGan: That is all. [97]

Mr. Meindl: If your Honor please, the plaintiff now offers part of the deposition of James Edward

Mahoney, referring only to the cross-examination taken of the defendant's witness.

Mr. McGan: If the Court please, we will object unless he wants to offer it all.

Mr. Meindl: Possibly they can offer the other part, your Honor.

The Court: Well, if you offer it I am going to permit the admission of this other document for the purpose of impeachment.

Mr. Meindl: Very well, your Honor. We will offer the cross-examination.

The Court: You understand, of course, I am not ruling that it is impeaching at all, but simply if you offer the cross-examination I will permit the document to go in.

Mr. Meindl: Well, we understand how your Honor is going to rule, but we do call your Honor's attention to the fact that that is part of the direct examination.

The Court: Yes.

Mr. Meindl: This is the deposition of James Edward Mahoney, taken by the Government at Seattle, Washington on the same day as the other deposition. We are offering the cross-examination by *my*self. [98]

The cross-examination of the

DEPOSITION OF JAMES EDWARD MAHONEY,

Defendant's Pre-Trial Exhibit No. 8, was then read to the jury; said cross-examination, omitting

(Deposition of James Edward Mahoney.)

all formal parts, is in words and figures as follows, to-wit:

Cross Examination

By Mr. Meindl:

Q. Mr. Mahoney, when your brother came home from the Army, did you notice that he was suspicious of members of the family?

A. I would not say that he was suspicious, in those words.

Q. Well, describe how he was in that respect.

A. Well, irritable, and feeling that he was getting the worst of things. That was the opinion that he expressed.

Q. Did you notice that he didn't pay much attention to what was going on around him; that he seemed to live in a world of his own?

A. He never took a great interest in any one particular thing.

Q. How was he before he went in the Army, in that respect?

A. He was okeh as far as I could see. I would say that he was normal and healthy, with good habits.

Q. How about his mental actions before he went in the Army?

A. Well, he was just like the average person.

Q. Did he associate with people before he went in?

A. Yes, he associated more with people before he went in.

(Deposition of James Edward Mahoney.)

Q. Did you notice any change when he came home, in that respect?

A. Yes, in that respect, that he didn't associate with friends, but in general, he never had any real friends. That is, he would talk to different people and speak to them; but he never had what you would say a main pal [99] that he went with like he did before he went into the Army.

Q. Did he ever feel that people were against him before he went in the Army?

A. I never noticed that feeling.

Q. Was there a change in that respect when he came home?

A. Yes. I would say there was a decided change.

Q. How was his conversation before he went into the Army? A. Normal.

Q. Did you notice any change in that when he came home?

A. Yes. I noticed that he talked, and skipped from one subject to the other after he returned, in the conversation.

Q. But would you say there was an entire change of personality when he came home from what there was before he went in the Army?

A. I would say there was a change in his personality, yes.

Q. And did you notice the same things which you had when you saw him in Portland in 1923?

A. Yes, I did.

(Deposition of James Edward Mahoney.)

Q. Did you notice the same things when you saw him in North Dakota in 1927?

A. Yes, I noticed that.

Q. Aside from those few minutes you saw him in 1937 in Portland, Oregon, had you seen him since 1927, to this time?

A. No, I haven't; I haven't.

Q. On direct examination you mentioned that your brother got into a lot of quarrels and fights. When did that take place?

A. In 1921 or '20, when he was home from Oregon, and again in Portland on a couple of occasions that I would see him. [100]

Q. Was he that way before he went into the Army?

A. No, he wasn't that way, I would say.

Q. You say he got out of patience with you when he came home from Oregon. Describe what happened, will you, please?

A. Well, it was just family affairs that would come up, and he would think that he was getting the worst of it, and after carrying on a conversation for five or ten minutes, why, he would become angry and, of course, we would realize his condition, and I would stay away from him for that reason.

Q. Was he like that before he went into the Army? A. No, I wouldn't say that he was.

Q. Did you know of any work that your brother William did except that power company work in Minot? A. None other to my knowledge.

Q. Do you remember that your brother came

(Deposition of James Edward Mahoney.)

home on a furlough when he was still in the Army?

A. Yes, I recall it.

Q. Do you recall just about when that was, what year? A. It was about 1919, I believe.

Q. Were you at home at that time?

A. Yes.

Q. What did you notice about your brother on that occasion?

A. His mental or physical condition?

Q. Well, both.

A. His physical condition was very poorly, because he walked with the aid of a cane, and he would move very, very slowly, and it took him, oh, say, at least half a minute to sit down or get up again. He had to brace himself and pull himself up. He could not use crutches because it was a strain on his back. He had to support himself with a cane because he was—well, so as to [101] enable him to move around up there with the cane.

Q. Was he able to dress and undress himself?

A. Not on the furlough, no. The members of the family helped him.

Q. How about shaving?

A. We shaved him. I shaved him on a couple of occasions.

Q. Now, did you notice when he was home on the furlough that he was nervous and irritable?

A. He was not so much then, because he was—I would say he was ill then and spent a great deal of time in the bedroom in bed.

Q. Did you notice any of these other things

(Deposition of James Edward Mahoney.)
you have testified to that you noticed when he came home that were present when he was there at home on his furlough?

A. Well, I know that he was irritable, but not to the extent that I noticed it afterwards.

Mr. Meindl: I believe that is all.

Mr. McGan: That is all.

Mr. Meindl: Just one more question.

Q. (By Mr. Meindl) By whom are you employed at the present time, Mr. Mahoney?

A. The Quartermaster Corps of the Army.

Q. Here in Seattle, Washington?

A. Yes.

Mr. Meindl: Thank you. [102]

Mr. Meindl: If your Honor please, that completes the depositions, and the plaintiff desires to offer into evidence the Pre-Trial Exhibit No. 12, being the honorable discharge.

The Court: Admitted. [103]

The honorable discharge of William V. Mahoney, Plaintiff's Pre-Trial Exhibit No. 12, was received in evidence, and is in words and figures as follows, to-wit:

PLAINTIFF'S PRE-TRIAL EXHIBIT No. 12

HONORABLE DISCHARGE FROM THE UNITED STATES ARMY

War Department, A.G.O., May 31, 1923.

The records show that this soldier was assigned

serial number 47,889, and that he was born in Flandreau, South Dakota, and so much of this certificate as shows otherwise, is in error.

M. J. O'BRIEN
Adjutant General

State of North Dakota.
Adjutant General's Office Bismark,
Paid in full, $700.00 Dec 20 1924.
Under the provisions of chapter 206, Session Laws of 1919, as amended.

G. A. FRASER
Adjutant General

To All Whom It May Concern:

This Is to Certify, That William V. Mahoney #241760, Private, Company #3, Service Battalion, Army Schools, A. E. F. The United States Army, as a Testimonial of Honest and Faithful Service, is hereby Honorably Discharged from the military service of the United States by reason of S.C.D.L.D. 4th Ind. H.C.D., Chicago, Ill. May 14, 1920.

Said William V. Mahoney was born in Flanders, in the State of South Dakota. When enlisted he was 21 3/12 years of age and by occupation a laborer. He had blue eyes, auburn hair, fair complexion, and was 5 feet 11 inches in height.

Given under my hand at U.S.A.G.H. #28, Fort Sheridan, Ill. this 22nd day of May, one thousand nine hundred and twenty.

H. F. CURTIS
Major, Medical Corps, U.S.A.
Commanding.

Enlistment Record

Name: William V. Mahoney #241760
Grade: Private Enlisted, or Inducted, July 15, 1917, at Minot, North Dakota.

Serving in First enlistment period of date of discharge. [104]

Prior service: None.

Noncommissioned officer: Never.

Marksmanship, gunner qualification or rating: Not rated.

Horsemanship: Not mounted.

Battles, engagements, skirmishes, expeditions: A. E. F.

Decorations, Medals, Badges, Citations: None.

Knowledge of any vocation: Laborer.

Wounds received in service: None.

Physical condition when discharged: Poor.

Typhoid prophylaxis completed—Unknown

Paratyphoid prophylaxis completed—Unknown

Married or single: Single.

Character: Excellent.

Remarks: No A.W.O.L. No absence under G.O. 31/12 or G.O. 45/14. Entitled to Sixty Dollar bonus. Entitled to travel pay to Minot, North Dak. Served in Infantry 7/15/17 to 5/22/20. Served in France. Left U. S. Dec. 15, 1917. Returned May 25, 1919.

Signature of soldier: William V. Mahoney.

H. F. CURTIS
Major, Medical Corps U.S.A.
Commanding Det. of Patients

Soldier paid travel pay at rate of five cents (5c) per mile under Act of Congress approved February 28, 1919.

I Certify that a Bronze-Silver Victory Button Was Issued on May 22, 1920.

GEO. R. RANDALL
Captain, M.C.

Finance Office
Fort Sheridan, Ill.

May 21 1920

Paid in full $124.95 including $60.00 Bonus authorized by Revenue Act Approved February 24, 1919.

R. S. AMOS ?
2nd Pt. Q.M.C. Finance Officer

[105]

(Plaintiff's Exhibit No. 4, which consists of a certificate signed by J. A. Ulio, Major General, The Adjutant General, and 134 photostats, is the service and medical record of the insured during his army service. All instructions contained in such record, blank pages not filled in, temperature charts, duplications, and other irrelevant matter have been omitted. The material portions of said exhibit are in words and figures as follows, to-wit:) [107]

18V

CERTIFICATE OF DISABILITY FOR DISCHARGE

of Mahoney, William—47-889. Private Co. 3 Serv. Bn. Army Schools.

Plaintiff's Exhibit No. 4—(Continued)

Enlisted July 15, 1917 at Minott, N. D. by Unknown Temp. Service Record.

Age at enlistment 21 yrs. and 3 mos.; occupation, Laborer.

Prior service: None.

Recommended for discharge on account of crushing fracture of 12th dorsal and 1st & 2nd lumbar vertebrae.

Became unfit for duty from present disease or injury Nov. 11/18

Disease contracted or injury received Nov. 11, 1918. Langres France.

When disability arose soldier was with command.

Cause of disease, or circumstances under which it appeared: Accidentally incurred. No further evidence re incurrence of disability obtainable. One copy of affidavit attached.

Disability was incurred in line of duty.

(Signed) N. F. CURTIS
Major, Med. Corps.
Commanding Det. Patients.

USA.GH.#28
Ft. Sheridan, Ill.
May 11, 1920. 2300 1b

[125]

I certify that I am applying for this discharge under the provisions of CL 345 SGO

WILL V. MAHONEY

REPORT OF BOARD OF MEDICAL OFFICERS

From a careful consideration of the evidence

Plaintiff's Exhibit No. 4—(Continued)

obtainable in the case and a critical examination of the soldier,

We Find: That he is unfit for service as a soldier because of

1. Crushing fracture of the 12th dorsal and the 1st and 2nd lumbar vertebrae. Accidentally incurred by being hit on the head by 3 sacks of potatoes on Nov. 11, 1918, at Langres, France, L.O.D. Yes (soldier's statement). Present condition no motion in the lower dorsal and lumbar region left; marked scoliosis of the dorsal and lumbar region. Maximum amount of improvement from treatment has not as yet been obtained; soldier is being discharged under the provisions of CL 345 SGO.

That the disqualifying disability did not exist prior to enlistment and did originate in line of duty.

That the medical officer who enlisted the soldier is not blamable (867 A.R.).

We Therefore Recommend

That the soldier be discharged for disability which was incurred in line of duty.

Length of time case has been under observation of one or more members of the board seven days.

In view of occupation, to what extent is he disabled from earning subsistence? eighty per cent.

Plaintiff's Exhibit No. 4—(Continued)

The soldier did not decline treatment for the relief of disability (161 A. R.).

(Signed) L. J. OWEN
Lt. Co. MC
(Signed) P. G. PETERSON
1st. Lt. MC

2301 2b

[126]

Mahoney William O
Pvt 3rd Ser Bn
22 W S Dak 1-7/12
Date of admission. Nov 11, 1918
Source of admission. By Tr CH 24 Feb 15/19
Cause of admission FS—and dislocation—11th dorsal vertebrae, accidentally incurred by being struck with sacks of potatoes while unloading same at Commercy, France. Nov. 11, 1918 [131]
In line of duty? Yes.
Disposition.
Trfd to Hosp Center, Savenay.
Date of disposition April 12, 1919.
Name of hospital, etc.
Base Hosp. #90 Chaumont (Hte-Marne) France.
(signed) OTM
2nd Lt. San C. Registrar

2183 9d

Days of treatment in current case current year	
Year, 1919	in hospital
January	31
February	28

Plaintiff's Exhibit No. 4—(Continued)

March	31
April	11
November 1918	20
December	31
Total	152

2184 10d

Mahoney William.
Pvt 3rd S. Bn and Schools.
23 W S. Dak 1.10/12.
Register No. 241760.
Date of admission. 11th November 1918.
Source of admission. Command.
Cause of admission.
FS and dislocation of 11th dorsal vertebrae, accidentally caused by a sack of potatoes falling on his back.
Hosp
In line of duty? Yes.
Disposition.
Tfd to Transport Per Auth S.O.—41 1918 HAEF with View to S.C.D.
Dte of disposition May 14, 1919.
Name of hospital, etc. [132]
Base Hospital #69.
Amer. E. F. France.
Sent with report of S. & W. for month of May 1919 From same.
(signed) CBT
Capt Med Corps.

2185 11d

Plaintiff's Exhibit No. 4—(Continued)

Days of treatment in current case, current year

Year, 1919	in hospital
January	31
February	28
March	31
April	30
May	13
November 1918	20
December	31
Total	184

2186 12d

*241760

Mahoney, William O.

Pvt 3 Sew bat.

23 W SD

Date of admission. 5-14-19.

Source of admission. USA BH # 69.

Cause of admission. Dislocation 11th dor. vert. Dislocation 11th dorsal vert. # 2013.

In line of duty? Yes.

Disposition. transferred to Debarkation Hosp N Y.

Date of disposition. May 25 1919.

Name of hospital, etc. USS Mercy. [133]

(Signed) U. R. WEBB
Comdr (MC)
Commanding

2187 13d

*241760

Mahoney, Will V.

Pvt. 3rd A. S.

Plaintiff's Exhibit No. 4—(Continued)

23 W S. Dak. 1-11/12.

Register No. 2344.

Date of admission. June 5th 1919.

Source of admission. Transferred from USA. Emb. Hosp. #5, N. Y.

Cause of admission. (Convalescent AEF)

Fracture, simple, of 10th 11th and 12th dorsal vertebrae, incurred while on duty at Langres, France on Nov. 11th 1918., a load of potatoes falling on soldier.

Hosp.

In line of duty? Yes.

Disposition. Transferred to U. S. Army General Hospital # 26, Fort Des Moines, Iowa. (*)

Date of disposition. August 20, 1919.

Name of hospital, etc. U. S. Army General Hospital No. 27 Fort Douglas, Utah.

Sent with report of S. & W. for month of Aug. 1919.

(signed) RWJ

Captain M.C.

2189 15d

Days of treatment in current case, current year	
Year, 1919	in hospital
June	26
July	31
August	20
Total	77

(*) For further observation and treatment.

2190 16d

Plaintiff's Exhibit No. 4—(Continued)

Mahoney Will V.

Pvt. 3rd A. S.

23 W S.D. 2-1/12.

Register No. 3094.

Date of admission. Aug. 22, 1919.

Source of admission. By trans. from USA Gen. Hosp. #27 Ft. Douglas Utah. (a)

Cause of admission. Convalescing from fracture, simple 10, 11 and 12 dorsal vertebra. Accidentally incurred as result of three sacks of potatoes falling upon back, while on duty in warehouse at Langres, France. (Soldiers statement)

Condition on admission: Fracture united.

Hosp.

In line of duty? Yes.

Disposition

Trans. to USA Gen. Hosp #28 Ft. Sheridan, Ill., per SO 277 Hq. USA.

Gen. Hosp. #26 Ft. Des Moines Iowa.

Date of disposition Oct 13, (b) 1919.

Name of hospital, etc. U.S.A. General Hospital #26 Fort Des Moines Iowa.

Sent with report of S. & W. for month of from same.

(Signed) W. S. SHARPE
Major M.C.

2191 17d

Days of treatment in current case, current year	
Year, 1919	in hospital
August	10
September	30

Plaintiff's Exhibit No. 4—(Continued)

October 13

Total 53

(a) SO 188 Hq. Ft. Douglas Utah. Dated Aug. 20, 1919. Orig. entry June 5, 1919.

(b) Dated Oct. 12, 1919, for further observation and treatment.

Headquarters
U.S.A. General Hospital No. 28
Fort Sheridan, Ill.
Forwarded Oct 17 1919.

CR

Registrar 2192 18d

[135]

*241760

Mahoney Will V.
Pct. 3rd A.S.
23 W S.Dak 2-1/12.
Register No. 42796.
Date of admission. Oct. 14th, 1919.
Source of admission Par 1 SO 277, Ft. Des Moines, Iowa. Oct. 13/19.
Cause of admission.

Fracture, simple, 10, 11 and 12th dorsal vertebra, accidentally incurred at Langres, France, by three sacks of potatoes falling upon back, while on duty in warehouse. Date unknown. Present condition: Fracture united. Convalescing.

Hosp.
In line of duty? Yes.

Plaintiff's Exhibit No. 4—(Continued)

Disposition.

On furlough per 106 A.R.

Date of disposition. Oct 30, 1919.

Name of Hospital, etc. Hq. U.S.A. Gen. Hosp. #28, Ft. Sheridan, Ill.

Sent with report of S. & W. for month of Oct. 1919.

(signed) EG 2193 19d

Days of treatment in current case, current year

Year, 1919	in hospital
October	17
Total	17

2194 20d

*241760

Mahoney Will V.

Pvt 3 AS

23 W S Dak 2-4/12.

Register No. 42796-46306.

Date of admission. Jan. 10, 1920.

Source of admission. From furlough.

Cause of admission.

Fracture, simple, 10, 11, and 12th dorsal vertebra. Accidentally incurred, at Langres, France, by three sacks of [136] potatoes falling upon back while on duty in warehouse. Date unknown. Present condition: Fracture united. Convalescing.

Hosp.

In line of duty? Yes.

Disposition.

On furlough Par 106 AR.

Plaintiff's Exhibit No. 4—(Continued)

Date of disposition Jan 17, 1920.

Name of hospital, etc.

Hq. U.S.A. Gen. Hosp. #28, Ft. Sheridan, Ill.

Sent with report of S. & W. for month of Jan. 1920.

(Signed) DEG

Major, MC. 2195 21d

Days of treatment in current year, current case

Year, 1920	in hospital
January	8
Total	8

2196 22d

CORRECTION CARD *241760

Mahoney Will V.

Pvt 3rd A.S.

23 W S.Dak. 2-6/12.

Register No. 42769-47068.

Date of admission. Jan. 24th, 1920.

Source of admission. From furlough.

Cause of admission.

(a) (Old) fracture, simple, 12th dorsal, 1st and 2nd lumbar vertebrae. Accidentally incurred by being hit on the head by three sacks of potatoes at Langres, France, Nov. 11/18. (Soldier's statement). Condition on admission: Marked scoliosis dorsal and lumbar.

Hosp. (b)

In line of duty? Yes. [137]

Disposition. sch:CD 4th Ind HCD, Chicago, Ill.

Plaintiff's Exhibit No. 4—(Continued)

May 15/20: Final diag: Scoliosis, marked, dorsal and lumbar region, (c)

Date of disposition May 22nd, 1920.

Name of hospital, etc.

U.S.A. Gen. Hosp. #28, Ft. Sheridan, Ill.

Sent with report of S. & W. for month of May, 1920.

(Signed) H. C. BRADFORD
Maj M.C.

2197 23d

Days of treatment in current case, current year

Year, 1920	in hospital
January	8
February	29
March	31
April	30
May	22
Total	120

(a) corrected entry.

(b) region.

(c) with complete loss of motion.

Disab: 80%. In line of duty.

Maximum amount of improvement from treatment has not as yet been obtained. Soldier is being discharged under the provision of CL# 345 SGO

2198 24d

FIELD MEDICAL CARD

Mahoney, William O.

Pvt. *241760 3rd Serv. Bn.

Plaintiff's Exhibit No. 4—(Continued)

Sick

Line of duty—Yes.

Camp Hosp. No. 24.

Date of admission Nov. 11, 1918.

Diagnosis F. & dislocation 11th dorsal vertebra.

(signed) E. H. KIRSCHBAUM
1st Lt. MC USA

By 69

Fracture & Dis. 11th dorsal vertebra—no paralysis jacket applied. Fit for move to U.S. Xray shows involvement of 1st dorsal San. lateral deviation.

E. F. DODDS
M.C. [138]

Date 4/25/19.

Examined and passed for Evac. to U. S.

R. S. FARR,
Lt. M. C.

Arrived at U. S. A. Dep. Hosp. #5, New York City.

Departed for May 25, 1919.

U. S. Army General Hospital No. 27, Fort Douglas, Utah, Jun 7 1919.

4/17/19 Neurologic illegible in both lower extremities.

No objective sensory fingings.

Reflexes are lively.

KJ-S are present and normal on both sides.

SJ san lively on left side.

No adhesions.

No involvement of organic sphincters.

Plaintiff's Exhibit No. 4—(Continued)

Date of entry Nov. 11, 1918.

Operation laminectomy 10th 11th 12th dorsal vertebrae.

Uneventful recovery.

Feb. 11—cast applied, able to sit up & walk about.

EHK

Base Hospital No. 90.

Date of entry 2-15-19.

Feb. 27.

Diagnosis.

Fracture and dislocation of 11th dorsal vertebrae, no paralysis.

(Signed) C. S. WHARTON,
Lt. M. C.
3/4/1919.

Request Xray report of region involved.

LT. L. D. McNAUGHTON,
Pres. D. B.

Admitted 5/25/19.

Evacuated 6/2/19.

Ft. Douglas, Utah. 2306 2e

[139]

CLINICAL RECORD

History of Present Disease

Nov. 11, 1918. Langres, France, 3 sacks of potatoes fell and hit him on head and shoulders and jack-knifed him.

Went to Camp 24 Hosp.

Langres—cast applied—staid there until Feb. 15, 1918.

Plaintiff's Exhibit No. 4—(Continued)

Then to Base Hosp. 90 at Chaumont, France—staid there until April 12, 1918.

New cast put on.

Then to Savaney, France Base Hosp. #69

—staid there until May 15-1918.

Then to Grand Central Palace Hosp. New York

—staid there 1 week.

Then to Fort Douglas Salt Lake City Utah

—Brace made for his back

—staid there until Aug. 20, 1918. Then to Fort Des Moines, Ia.

(over)

Mahoney, Will V. 2223 6 L

Lamenectomy at Langres France

—Nov. 11, 1918

2224

Clinical Record

Subjective Symptoms

Condition on admission:

Brace on back.

Walks with crutch.

Mahoney, Will V. 2257 7 L

Clinical Record

Ocjective Symptoms

Weight: Normal 165; Present 140.

General condition: Good.

Special senses: Neg.

Skin and mucous membranes: neg.

Glandular system: Neg. [145]

Vascular system: Neg.

Blood pressure: Not taken.

Plaintiff's Exhibit No. 4—(Continued)

Heart: Neg.

Lungs: Neg.

Genito-urinary system: Neg.

(Signed) GD.

Mahoney Will V. 2226 8 L

Clinical Record

Objective Symptoms—continued

Diagnosis of ward surgeon:

Old frac 10, 11, 12 Dorsal vertebrae from bags of potatoes falling on him at Langres, Fr. Nov. 11, 1918, while stacking them in warehouse.

L. O. D. yes.

(Signed) J. P. BLUACIEP.

Mahoney Will 2227 9 L

Clinical Record

Progress

4-7-20. Is doing better.

Now walking without brace and he walks better.

(Signed) W. J. WUMLLER.

4-20-20 Ready for discharge soon.

(Signed) W. J. WUMMLLER.

Mahoney Wm. 2228 10 L

Clinical Record

Progress

Oct. 23 Transferred into Ward 37 with no history except that which was transferred with him from Des Moines. Capt. Merrer says that is all that is required.

Oct. 25 An absolutely helpless patient when down. Can't rise, nor dress, nor wrap leggings.

[146]

Plaintiff's Exhibit No. 4—(Continued)

Oct. 27 Walks like a ghost or slips about like a mummy on skids.

Skiagram requested.

Oct. 30 On 30 da. leave furlough acct. death of father Minot, N.D.

Jan. 10 Returned looking well and several pounds (18) heavier.

Jan. 14 Request Xray.

Jan. 16 Request furlough 15 days acct. death of father.

Leaves on furlough.

Jan. 25 Return from furlough improved.

Feb. 10 Does not get around well without brace.

Feb. 25 Still wears support.

Mahoney Will 2229 11 L

Clinical Record

Objective Symptoms—continued

Liver, Neg.

Spleen, Neg.

Tenderness, Neg.

Masses, Neg.

Nervous system: Neg.

Osseous system: Neg.

Muscles and joints: Neg.

Diagnosis of ward surgeon: Audt Fracture 10th 11th 12th dorsal vertebra incurred Nov. 11 1918 at Langres, France, caused by sacks of potatoes falling down on his head and shoulders.

L. O. D. yes.

Mahoney, Will V. 2232 14 L

Plaintiff's Exhibit No. 4—(Continued)

Clinical Record

Progress

Aug. 22 Brace removed and adjusted.

Patient has difficulty in sitting down and getting up without brace.

Aug. 27-19. Patient up and about.

Feels better.

initials G. D.

Sept. 3, 1919 Transferred to Ward 7. [147]

Sept. 30, '19. Pt. gets up and about when helped some.

No pain.

Eats & sleeps well.

initials G. W. O.

Mahoney, Will V. 2233 15 L

Clinical Record

Progress

10/13/19. Is helped in & out of bed.

Walks fairly well when up and in brace.

Transfer to Fort Sheridan this wk.

initials G. W. O.

3-28-20.

Patient was injured Nov. 1918, when a pile of potatoes fell on him.

Walks with a protective gait, there is a marked kyphosis of the spine, dorsal & upper lumbar region.

No point of tenderness can be found.

To have new Xrays taken, to determine if possible the injury.

Plaintiff's Exhibit No. 4—(Continued)

Patient is extremely nervous and borders on hysteria.

(Signed) W. J. WUMLLER.

Mahoney, Will V. 2234 16 L

Clinical Record

Radiographic Report

Station Ft. Sheridan, Ill.

Date Oct. 28 1919.

From Ward 37.

To X-RAY Laboratory U. S. A. General Hospital No. 28.

Information requested: 10, 11, 192 dorsal vertebrae.

Clinical diagnosis: old frac. 10, 11, 12 vert.

CAPT. CRACROFT.

Laboratory U. S. A. General Hospital No. 28, Oct. 29, 1919.

X-ray findings: Radiogram of the vertebral column, taking in the 9, 10, 11 and 12 dorsal, and the 1, 2, 3d. lumbar vertebrae shows a marked lateral deviation at the level of the last dorsal [148] and the 1st lumbar, also the 1st and 2d lumbar, with more or less obscurity of the outline of the articulating surfaces. I am unable to determine any pathological condition of any of the dorsal vertebrae but there is.

Plate

number Size

7103½ 3BP

(Signed) B. R. LUDY,

Captain, M. C.

Mahoney Will V. 2236 18 L

pvt 3d A S

Plaintiff's Exhibit No. 4—(Continued)

In evidence a crushing fracture apparently at the 1st and 2d lumbar vertebrae and fracture of the transverse process of the 1st lumbar on the left side.

Would suggest this patient be examined again after 15 days have elapsed, attention Captain Rhudy.

2237

Clinical Record
Radiographic Report

Station Fort Sheridan, Ill.

Date January 19, 1920.

From Ward 37.

To X-Ray Laboratory, U. S. A. General Hospital No. 28.

Information requested: four lower dorsal vertebrae.

Clinical diagnosis: fracture 10, 11, 12 dorsal vert.

CAPT. CRACROFT.

Laboratory U. S. A. General Hospital No. 28, January 30, 1920.

X-ray findings: There is no pathology of the 9, 10, 11, and 12th dorsal vertebrae other than scoliosis.

However, marked haziness is observed in the region of the 1st and 2d lumbar vertebrae.

Would suggest that stereoscopic plates be made of these two vertebrae.

Plaintiff's Exhibit No. 4—(Continued)

Plate

Number size

7103½ 2BP 1CF

(Signed) B. F. HOYT,

Captain, M. C. 2238 19 L

[149]

Clinical Record

Radiographic Report

Station USA Gen. Hosp. No. 26.

Date Aug. 25, 1919.

From Lt. C. M. DeBeck Ward No. 8

To Capt. Weitzner.

Information requested: Dorsal and lumbar spine.

Clinical diagnosis: Old fracture of 10-11-12 dorsal vertebrae and lamenectomy.

(Signed) C. M. DeBECK,

1st Lt., M. C.

Labortory U. S. General Hospital No. 26, August 27, 1919.

X-ray findings:

The interspaces between the 9th-10th-11th and 12th dorsal and 1st-2nd and 3rd lumbar vertebrae are irregular in outline narrowed and hazy. The spinous processes of these vertebrae are absent. There is a fracture of the transverse process left side of the first lumbar vertebrae.

Plate

Number	size	part
9520R	10x12	spine
9521R	”	”

(Signed) C. F. WEITZNER,

Capt. M. C.

Plaintiff's Exhibit No. 4—(Continued)

Mahoney Will V.

Pvt. 3rd A. S. 2239 20 L

Clinical Record

Radiographic Report

Station Ft. Sheridan, Ill.

Date Feb. 9 1920.

From Ward 37

To X-Ray Laboratory U. S. A. General Hospital No. 28.

Information requested: 1st and 2d lumbar vert.

Clinical diagnosis: old injury lumbar vertebra.

CAPT. CRACROFT.

Labortory U. S. A. General Hospital No. 28, February 13, 1920.

X-ray findings: Stereoscopic plates of the 1st lumbar reveal an evacuated area 3x3 cm. involving the central region of this vertebra. Its spinous process cannot be visualized and there appears to have been a laminectomy performed.

No distinct shadow of the transverse process, left side of this vertebra, can [150] be seen.

Scoliosis is observed involving the 10, 11, and 12 dorsal and the 1st and 2d lumbar, with convexity to the right.

Plate

Number Size

7103½ 2BP

(Signed) B. F. HOYT,

Captain, M. D.

Mahoney Wm.

Pvt. 3d S BN 2240 21 L

Plaintiff's Exhibit No. 4—(Continued)

Clinical Record

Radiographic Report

Station Ft. Sheridan, Ill.

Date Mar. 28 1920.

From Ward 33

To X-Ray Laboratory U. S. A. General Hospital No. 28.

Information requested: spine, lumbar and dorsal region.

Clinical diagnosis: injury spine.

MAJOR WINOMILLER.

Laboratory U. S. A. General Hospital No. 28, Mar 31, 1920.

X-ray findings: Scoliosis lumbo-dorsal with convexity to the right. A triangular evacuation of 1st lumbar vertebra 4 cm. at base.

Spinous process anot visualized.

Transverse process left side of this vertebra apparently missing.

A laminectomy has evidently been performed this side. No further evidence of pathology lumbar spine is observed.

Plate

Number Size

71031/2 6BP

(Signed) T. V. KILJNE,

1st Lt., M. C.

Mahoney Wm. 2241 22 L

Pvt 3d S BN [151]

Plaintiff's Exhibit No. 4—(Continued)

Clinical Record

Brief

U. S. Gen. Hosp. No. 26.

Register No. 7094 Ward 8.

Mahoney, Will V.

Pvt. 3rd A. S.

23 W 2-1/12.

Birthplace S. Dak.

Station Fort Des Moines, Ia.

Date of admission Aug. 22, 1919. 4:00 P.M.

Source of admission By trans from U. S. Gen. Hosp. No. 27., Fort Douglas, Utah. S. O. #188.

Religion Catholic.

Home address 1251-3rd. So.Str., Minot, N. Dak.

Name and address of nearest relative mother, Mrs. Thomas Mahoney same address.

Initials of admitting officer H.L.P.

Disposition Trans. Ft. Sheridan, Ill.

Date Oct .13-19.

Final diagnosis Acct. fracture 10th 11th & 12th dorsal vertebra incurred Nov. 11, 1918 at Langres France caused by 3 sacks of potatoes falling on head & shoulders.

L. O. D. yes.

Condition on completion of case Walks fairly well in brace, no pain now.

(Signed) G. W. DAY,

1st Lt. M. C. 2257 1 i

Plaintiff's Exhibit No. 4—(Continued)

Clinical Record

Brief

U. S. Gen. Hosp. No. 28.

Register No. 42796 Ward 38.

Mahoney Will V.

Pvt. 3rd AS.

23 W 2 1/12.

Birthplace S. D.

Station Over Seas.

Date of admission Oct 14, 1919. [160]

Source of admission Trans fr USGH 26 SO 277 pp 1 Oct 13 1919.

Religion Cath.

Home address 123 3rd St St Minot N. D.

Name and address of nearest relative Mother, Mrs. Thomas.....same.

Initials of admitting officer H.T.G.

Disposition On 30 da furlough Par 106 AR.

Date Oct 30 1919.

Final diagnosis old frac 10, 11 & 12 dorsal vertebrae from bags of potatoes falling on him Langres, Fr. Nov. 11, 1918 while handling them in warehouse.

L. O. D. yes.

Condition on completion of case incomplete.

(Signed) Capt. T. B. CRACROFT.

2254 1 j

Fracture 10-11-12 Dorsal vertebrae

—ld 2255 2 j

Plaintiff's Exhibit No. 4—(Continued)

Clinical Record

Brief

42796

USA Gen. Hosp. #28.

Register No. 46306 Ward 37.

Mahoney William

Pvt 3rd A.S.

23 W 29/12.

Birthplace So. Do.

Station Over Seas.

Date of admission 1/10/20.

Source of admission Furlough.

Religion Cath.

Home address 412 Fifth Ave So East Miner So. Do.

Name and address of nearest relative mother, same add.

Initials of admitting officer D.E.E.

Disposition On 15 da furlough AR 106.

Date Jan 17/1920.

Final diagnosis Frac 10th, 11th, & 12th dorsal vertebrae incurred Nov. 11, 1918 at Langres, France causer by 3 sacks of potatoes falling down on his head and shoulders.

L. O. D. yes.

Condition on completion of case incomplete.

(Signed) CAPT. T. B. CRACROFT.

2252 1 k

[161]

Plaintiff's Exhibit No. 4—(Continued)

REPORT OF DISABILITY BOARD

Held at Base Hospital 90 under G. O. No. 41, G. H. Q. A. E. F., March 14, 1918.

Mar. 26, 1919.

Mahoney William 241760.

Pvt. 3rd Ser. Bat.

1. Nature of disability: Fracture dislocation 11 dorsal ver.

2. Disability did not exist prior to entry into service.

3. Disability is in line of duty.

4. Classification D.

5. Nature of duty recommended:

H. F. CONNELLY,
Major, Medical Corps Pres. Board.

J. D. PILCHER,
Major, Medical Corps.

A. SKVERSKY,
Medical Corps, 1st Lieut.

2304 1 m

U. S. Army General Hospital #27,
Fort Douglas, Utah.
July 8, 1919.

From: Chief of Surgical Service, Ft. Douglas, Utah.

To: Commanding Officer, Ft. Douglas, Utah.

Subject: Recommendation for transfer of Private Will V Mahoney #241760, Co. 3 Army School.

1. Simple fracture 10, 11 and 12 dorsal verte-

Plaintiff's Exhibit No. 4—(Continued)

brae. On November 11th, 1919 at Langers, France a load of potatoes fell on the patient causing a fracture of the above named vertebrae. He was operated upon (Laminectomy) . There is no injury to the spinal cord. Patient has been in a plaster cast most of the time since recovery from operation —at present is wearing a steel back brace. The injury is healed but the back muscles are weak.

2. Patient is progressing favorably and able to walk with assistance when wearing the brace.

3. Patient will need attendant while traveling.

4. Home address—Minot, N. D.

5. Enlisted at Minot, N. D.

6. Recommend that this patient be transferred [162] to a suitable hospital for future observation and treatment.

(Signed) W. E. RANZ,
Major, M.C.U.S.A.

201 (Mahoney, Will V.) 1st Ind. EAL/eml

U. S. Army General Hospital No. 27, Fort Douglas, Utah, July 9, 1919.

To:—Surgeon General, U. S. Army, Washington, D. C.

1. Forwarded, recommending the transfer of this soldier to a suitable hospital.

(Signed) A. D. PARCE,
Lieut. Col., M. C., U. S. A.,
Commanding.

1 Incl.

Mr. Meindl: The plaintiff offers into evidence Pre-Trial Exhibit No. 1, report of veteran's examination.

The Court: Admitted. [164]

(Medical reports, Defendant's Pre-Trial Exhibit No. 1, introduced in evidence by the plaintiff, are in words and figures as follows, to-wit:)

DEFENDANT'S PRE-TRIAL EXHIBIT No. 1

HOSPITALIZATION OF CLAIMANT

2/5/42

From: Budget Officer and Chief of Statistics

To: Department of Justice

Name of Claimant Mahoney, William V. C-No. 430 162

Rank and Org. Pvt. Co. 3 S Bat. Army School

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hospital	Admitted Hosp.	Discharged	Diagnosis	Authority
V.A. Facility American Lake, Wash.	4/ 5/34	6/10/34 A.W.O.L.	Epilepsy, petit mal Arthritis, ch., traumatic dorsal and lumbar spine Fracture, lumbar vertebrae, 1st, 5th & 12th dorsal, healed, with fusion and ankylosis. Flat feet, bilaterel, second degree Cicatrix over spine, PO, non-symptomatic	VAF, American Lake, Wash.
V.A. Facility American Lake Wash.	10/11/35	1/17/36 A.W.O.P.	Psychosis, epileptic, deterioration Conjunctivitis, chronic Hyperopia, mild Deviation, nasal septum Weak feet, second degree, none-symptomatic Hallux valgus, right great toe Cicatrices, non-symptomatic Absence, of teeth (7) acquired.	VAF, Am. Lake, Wash.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hospital	Admitted Hosp.	Discharged	Diagnosis	Authority
V.A. Facility Am. Lake, Wash.	2/29/36	5/11/36 A.W.O.P.	Psychosis, epileptic deterioration Conjunctivitis, chronic Hyperopia, mild Deviation, nasal septum Weak feet, 2nd degree, non-service Hallux valgus, rt. gr. toe Cicatrices, non-symptomatic Absence of teeth, acquired	VAF, Am. Lake Wash.
V.A. Facility Portland, Oreg.	10/29/37	11/ 5/37 Treatment Comp.	Wounds, recent, lacerated & contused, occipitoperietal region of scalp, left [165] Psychosis, epileptic deterioration Arthritis, chr. traum. dorsal & lumbar spine Scars, healed, P.O. lower dorsal & upper lumbar regions Fracture, old, healed, 12th dorsal & 1st & 5th lumbar vertebrae, w/ deformity & loss of bone structures Ankylosis of 12th dorsal & 1st lumbar Repair of lacerations, scalp	VAF, P-10 Portland Oreg.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hospital	Admitted Hosp.	Discharged	Diagnosis	Authority
			Scoliosis & Kyphosis, lumbo-dorsal. Limitation of motion, lumbo-dorsal spine Scars, traum. mult., head & Neck, old, healed Conjunctivitis, ch. Deviated nasal septum Missing teeth Hallux valugus, bilat., more marked Pes planus, 2nd degree, bilat. Hemorrhoids, external	
V.A. Facility Roseburg, Oreg.	1/19/38	Trial visit 4/ 2/38	Psychosis, epileptic deterioration Arthritis, ch. traumatic, dorsal and lumbar spine	VAF, Roseburg, Oregon
	Ret'd 7/ 2/38	Trial visit 6/ 9/39	Fracture, Lumbar vertebrae 1, 5, 12, dorsal, healed with fusion and ankylosis	
	Ret'd 7/21/39	Discharged 8/ 1/41	Cicatrix, P.O. spine	
		Expiration of Trial visit	Syphilis, tertiary Fracture, right mandible Phimosis, venereal	

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hospital	Admitted Hosp.	Discharged	Diagnosis	Authority
			Missing teeth Gingivitis, far adv. Operation: Dorsal incison of prepuce 8/22/38	
V.A. Facility Portland, Oreg.	5/ 1/38	5/ 4/38 Emergency relieved, while on trial visit from Roseburg	Psychosis, epileptic deterioration Nephritis, parenchymatous, ch. Lacerations, scalp & upper lip Contusions, eyelids Arthritis, ch., traumatic, dorsal & lumbar spine Scars, healed, P.O., dorsal & lumbar regions Fracture, old, healed, 12th dorsal & 1st & 5th lumbar vertebrae, with deformity & loss of bone structures Ankylosis, 12th dorsal & [166] 1st lumbar spine Scoliosis & kyphosis, lumbar dorsal Hemorrhoids, external deviated nasal septum Missing teeth Hallus valgus, bilat.	P-10 Portland, Oreg.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hospital	Admitted Hosp.	Discharged	Diagnosis	Authority
V.A. Facility Portland, Oreg.	7/17/39	7/20/39 Tr. to VAF, Roseburg, Entered Portland while on trial visit from Rose- burg, Oreg.	Phychosis, epileptic deterioration Nephritis, parenchymatous, chr., history Fracture of mandible Ecchymosis, L. lid Hemorrhage, subconjunctival L. Arthritis, chr., traumatic, old dorsal & lumbar spine Scars, healed, PO, dorsal & lumbar spine Fracture, old, healed, 12th dorsal & 1st & 5th lumbar vertebrae Ankylosis, 12th dorsal and 1st lumbar vertebrae Scoliosis & kyphosis, lumbo-dorsal spine Hemorrhoids, external Deviated nasal septum Hallux valgus Week feet Missing teeth	P-10 Portland Oreg.

S. M. MOORE, JR.,
By S. Andrus

Defendant's Pre-Trial Exhibit No. 1—(Continued)

REPORT OF PHYSICAL EXAMINATION

U. S. Public Health Service

C 430162

Place Minot, N. Dak. Date April 9, 1921

1. Claimant's name Mahoney William V.

2. Service, rank, and organization Pvt. Co 3 Service Batt. army school.

3. Present address 313 5th Ave. N. W. Minot, N. Dak. Ry Minot.

4. Age 25 5. Color White 6. Principal previous civil occupation Laborer.

7. Date of induction July 15, 1917 8. Date of discharge May 22, 1920.

9. Brief military history of claimant's disability: Flu B.H. Langres France May 1918 for 10 days. Fracture and dislocation of 10th, 11th and 12th Dorsal Vertebra while loading sacks of potatoes at Landres France Nov. 11, 1918. In C. H. 24 Langres France until Jan. 19, 1919. Laminectormy performed. In B.H. at Chaumont France until March 17, 1919. In Evac hospl at Savonaty France 3 weeks. Then back to New York to Grand Central Palace for a week. Then to G.H. at Fort Douglas from June 1st to Aug 23, 1919. Then to P.H. at Fort DesMoines till [167] Oct. 15, 1919. Then to U. S. Gen. hosp. May 22, 1920.

10. Back is still stiff. Unable to work.

11. 1st l. r. molar missing. Some teeth decayed. Varicose veings slight bilateral. Chest Neg. Scar 8½ inches long over spine in lower dorsal

Defendant's Pre-Trial Exhibit No. 1—(Continued)

and lumber region. Stiffness of spine. X Ray of spine shows slight displacement between 11th and 12th dorsal vertebrae and fracture of 12th dorsal 1st and 2nd lumbar vertebra.

Forwarded by Supervisor, District No. 10 U.S.P.H.S.

Vision (Snellen chart) (Uncorrected R 30/20,L 20/20.)
(Corrected by claimant's glasses R 20/20,L 20/20.)

Hearing (spoken voice) R 20/20.
L 20/20.

12. Diagnosis: Fracture of Vertebra Simple, 12th Dorsal 1st and 2nd Lumbar 1943. Dislocation of Vertebra (Twelfth) 1818.

13. Prognosis: Favorable.

14. Is claimant able to resume his former occupation? No Any occupation? Yes.

15. Is claimant bedridden? No 16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Has claimant a vocational handicap? Yes.

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself on this date? Yes.

22. Any other remarks: This man's condition

Defendant's Pre-Trial Exhibit No. 1—(Continued)

is improving and with vocational training should be able to handle any clerical or similar work.

Name A. J. McCannel
Title A. A. Surg. U.S.P.H.S.
Address Minot, N. Dak.

Received Apr 13 1921

82-934-1A

REPORT OF PHYSICAL EXAMINATION

U. S. Public Health Service

C. No. 430162
D. No. 10-13836

1. Claimant's name Mahoney, William V.

2. Service, rank, and organization Private, 3rd Co. Service Bn. Army School.

3. Present address 313-5th Ave. NW. Minot, N. Dak.

4. Age 25 5. Color W 6. Principal pre-war civil occupation Laborer.

7. Date of induction Jul. 15, 1917.

8. Date of discharge May 22, 1920.

Diagnosis: Fracture of vertebra, simple, 12th dorsal 1st and 2nd lumbar. Dislocation of vertebra, 12th.

Is his physical and mental condition such that vocational training is feasible? Yes. (report torn and small pieces missing) [168]

Did you examine the man yourself on this date? No. Data taken from file.

Place Minneapolis, Minn. Date May 3, 1921.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Name H. E. Bank, M. D. Title Asst. D. M. O. F.B.V.E.

Follow-up report is not necessary.

Date May 5 1921

Henry L. Williams, D.M.O., Dist. No. 10

jjb

REPORT OF PHYSICAL EXAMINATION

U. S. Public Health Service

C No. 430162 S

Place Minot, N.Dak. Date August 18, 1921.

1. Claimant's name Mahoney William

2. Service, rand and organization Pvt. Co. 3 Service Batt. Army School.

3. Present address 313 5th Ave. N.W. Minot, N. Dak. Ry. Minot.

4. Age 25 5. Color White 6. Principal previous civil occupation Laborer.

7. Date of induction July 15, 1917.

8. Date of discharge May 22, 1920.

9. Brief military history of claimant's disability: Flu B.H. Langres France May 1918 for 10 days. Fracture and dislocation of 10th, 11th and 12th Dorsal Vertebrae while loading sacks of potatoes at Langres France Nov. 11, 1918. In C.H. Langres France until Jan. 19, 1919. Laminectomy performed. In B.H. at Chaumont France until March 17, 1919. In Evac Hospital at Savonaty France 3 weeks. Then back to New York to Grand Central Palace for a week. Then to G.H. at Fort Douglas from June 1st. to Aug. 23, 1919. Then to B.H. at Fort DesMoines till Oct. 15, 1919. Then

Defendant's Pre-Trial Exhibit No. 1—(Continued) to U.S. Gen. Hosp. at Fort Sheridan. Given S.C.D. from Army and discharged from Hosp. May 22, 1920.

10. Back is still stiff. Unable to do heavy work.

11. 1st. L.R. Molar missing. Some teeth decayed. X-ray of spine Apr. 9, 1921 showed slight displacement between 11th and 12th dorsal vertebra and fracture of 12th dorsal 1st and 2nd lumbar vertebrae. Varicose veins slight bilateral. Chest Chest Negative. Scar 8½ inches long over spine in lower dorsal and lumbar region. Stiffness of spine.

Vision (Snellen chart) (Uncorrected R30/20, L 20/20.)
(Corrected by claimant's glasses R 20/20, L 20/20.)

Hearing (spoken voice) R 20/20.
L 20/20.

12. Diagnosis: Needs Dental Work. Fracture of Vertebrae Simple, 12th Dorsal and 1st and 2nd. Lumber 1943. Dislocation of Vertebrze (Twelfth) 1818.

13. Prognosis: Favorable.

14. Is claimant able to resume his former occupation? No Any occupation? Yes.

15. Is claimant bedridden? No 16 Is claimant able to travel? Yes. [169]

17. Do you advise hospital care? No.

18. Will claimant accept hospital care? Yes.

19. Has claimant a vocational handicap? Yes.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

20. Is his physical and mental condition such that vocational training is feasible? Yes.

21. Did you examine the man yourself this date? Yes.

Name A. J. McCannel
Title A.A. Surg. USPHS.,
Address Minot, N. Dak. 82-93-1A

U. S. VETERANS' BUREAU

13th District

Place Seattle
Date 1-17-23

Dr. Joiner

Attending Specialist, U.S. Veterans' Bureau

Sir:

It is requested that you examine the bearer, Mr. Wm. V. Mahoney, C 430162 V.R. a beneficiary of the U. S. Veterans' Bureau, and report your findings and recommendations below.

By authority of the District Manager:

Diagnosis: Acute Rhinitis—Chronic catarrhal.

Recommendations: Chlontone inhalant gr. spray nose q. sl. Zu. S. E. A. (illegible)

Jan. 17, 1924 W. E. JOINER
Date examined Attending Specialist

415

REPORT OF PHYSICAL EXAMINATION

C.No. 430 162

1. Claimant's name Mahoney, William V. married.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

2. Service, rank, and organization Pvt. Co. 3 service Batt. Army School.

3. Present address 2301 E. Madison St. (Lowell Court) Seattle, Wash. [170]

4. Age 27 5. Color White 6. Principal prewar civil occupation Laborer.

7. Date of induction July 15, 1917.

8. Date of discharge May 22, 1920.

9. Brief history of claimant's disability during service: Oversea from Dec. 15, 1917, until May 15, 1919. Had "flu" May 1918 for 10 days Field Hosp. Langres France. Returned to duty. Fracture and dislocation of 10, 11th and 12th Dorsal vertebrae on Nov. 11, 1918. Hosp. #24 for 2 months. Laminectomy performed at #24. Transferred to B.H.#90. There until March 1919. Then to Savenney in hospital. There until May 1919. Then to U.S.A. to Grand Central palace for a week. Then to G.N. at Fort Douglas from June 1st to Aug. 23, 1919. Then to Fort Des Moines, Iowa until Oct. 15, 1919. Then to U.S. Gen.Hospital at Fort Sheridan. There until discharged S.C.D. May 22, 1920. Post-service—No serious illness. No operations. Has had weakness in back. Industrial history—Entered vocational training Jan. 9, 1922. Training interrupted Jan. 15, 1924. Family History. Mother living and well. Father died—cause unknown. 2 brother living and well. 1 sister living and well. 2 sisters dead cause unknown.

10. Present complaint: Stiffness and weakness

Defendant's Pre-Trial Exhibit No. 1—(Continued)

in dorsal spine. I am unable to do any lifting or hard work.

11. Physical examination: Fairly well nourished male adult. Color good. Weight without coat 134. Height in shoes 70½". Temperature 97.8 Pulse 76. Skull and Scalp: normal in shape, size and appearance. Eyes, Ears, Nose and Throat apparently normal. Teeth: referred to dental section as follows: "1 missing tooth (0023), 2 dental caries (0229), Gingivitis (0630) X-rays were taken of teeth. Recommendations: Dental treatment." Neck: No palpable lymphatics. Thyroid is normal. Thorax: Chest: shape, long, narrow and flat. Mobility poor but equal. Palpation apparently normal. Percussion and auscultation apparently normal. No rales. Heart: normal in tones, rate and boundaries. Blood pressure 125/80. No murmurs, no thrills. Abdomen and Viscera: Wlls intact. No masses, tenderness, rigidity, no hernia. Pelvis and Perineum: No deformity. No hemorrhoids. Genitalia: apparently normal. Venereal: Denies G.C., Lues and chancroid. Extremities, Bones, Joints and Skin: A scar on the back extending from 10th dorsal spine along the right spinal border to the upper margin of the sacrum 8¼" long, due to operation following fracture of spine. There is a kyphosis involving 10th, 11th and 12th dorsal vertebrae and the 1st and 2nd lumbar vertebrae. Also a slight right scoliosis in this same region. There is no motion in this part of the spine in any direction. There is tenderness to percussion over this region. The muscle

Defendant's Pre-Trial Exhibit No. 1—(Continued) over the lumbo dorsal region are atonic and atrophic. There is drooping of the right shoulder. X-ray lower dorsal and lumbar spine referred to Dr. Hopkins, Spec. Orth.&Surg. who reports:

"This film shows an old injury to the twelfth dorsal and the first, second and third lumbar vertebrae. The articular surface between the twelfth dorsal and the first lumbar is somewhat irregular and indistinct. The intervertebral space is narrowed and there is some lipping of the right upper border of the first lumbar on the left side and absorption on the right upper angle. The first and second lumbar vertebrae are practically fused, the intervertebral space being obliterated. The spines of these two vertebrae are absent along with part of the laminae. The second and third lumbar vertebrae are also fused, the intervertebral space bind practically obliterated. There is a left lateral curvature in the upper lumbar region with right curvature of the mid-dorsal region. Conclusions: Fracture of spine and bony ankylosis. The right foot presents a marked hallux valgus with [171] callosity over the distal head of the 1st metatarsal also a thick sensitive callous at the base of 5th toe right foot. There is 1st degree flat foot bilateral. Otherwise negative. Nervous System: apparently normal. Urinalysis: straw, clear, acid, sp.gr.1010, albumen and sugar negative. Wasserman reaction negative.

12. Diagnosis: 1. 3082 Fracture of spine. 2. 0106 Ankylosis bony of spine. 3. 0161 atony

Defendant's Pre-Trial Exhibit No. 1—(Continued)

muscles of back. 4. 0169 Atrophy muscles of back. 5. 0344 Curvature of spine (kyphsis). 6. 0346 Curvature of spine (scolosis). 7. 0662 Hallux valgus bilateral. 8. 0587 Flat foot bilateral 1st°. 9. 0209 Callosities. 13. Prognosis: Guarded for all.

14. Is claimant able to resume his prewar occupation? No, account of spine.

15. Is claimant bedridden? No. 16. Is claimant able to travel? Yes.

17. Do you advise hospital care? No. 18. Will claimant accept hospital care? Not offered 19. Is an attendant necessary? No 20. Is his physical and mental condition such that vocational training is feasible? Yes 21. Did you examine the man yourself on this date? Yes 22. Place Seattle, Wash. Date Jan. 18, 1924. Name See below. Title See below.

Any additional remarks: It is the opinion of this board that this claimant's disabilities of the spine and feet are permanent.

/s/ G. I. BIRCHFIELD
G. I. BIRCHFIELD,
Chairman

/s/ R. T. HOPKINS
R. T. HOPKINS,
Spec. In Orth.

/s/ A. C. FEAMAN
A. C. FEAMAN,
Recorder.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

U. S. VETERANS' BUUREAU #6873

13th District 2-14-17

Place Seattle, Wash.

Date Jan 18 1924

Sir:

You are requested to make X-ray Examination as indicated below:

Name Mahoney William V.

Address Seattle, Wash.

Compensation 430162

Parts requested Lower dorsal and lumbar spine

By authority of District Manager:

Board # A. C. FEAMAN

Date 1/18/24

Parts taken Lower Dorsal and Lumbar Spine.

No. and size of plates 2-14x17.

Record of findings :; 1/22/24

This film shows an old injury to the twlfth dorsal and the first, second and third lumbar vertebrae. The articular suface between the twelfth dorsal and the first lumbar is somewhat irregular and indistinct. The intervertebral space is narrowed [172] and there is some lipping of the right upper border of the first lumbar on the left side and absorption on the right upper angle. The first and second lumbar vertebrae are practically fused, the intervertebral space being obliterated. The Spines of these two vertebrae are absent along with part of the laminae. The second and third lumbar vertebrae are also fused, the intervertebral space bind

Defendant's Pre-Trial Exhibit No. 1—(Continued)

practically obliterated. There is a left lateral curvature in the upper lumbar region with right curvature of the mid-dorsal region.

Conclusions: Fracture of spine and bony ankylosis.

/s/ R. T. HOPKINS

RTH:raj. R. T. HOPKINS, M.D.,
Specialist, Orthopedics and
Surgery.

REPORT OF PHYSICAL EXAMINATION

Authority: Form 107D April 28, 1924.
C.No. 430 162

1. Claimant's name Mahoney William V. married.

2. Service, rank, and organization Pvt.Co. 3 Service Batt. Army School.

3. Present address 2301 E. Madison St. Seattle, Wash.

4. Age 28 5. Color White 6. Principal prewar civil occupation Laborer.

7. Date of induction July 15, 1917.

8. Date of discharge May 22, 1920.

9. Brief history of claimant's disability during service: Overseas from Dec. 15, 1917 until May 15, 1919. Had "Flu" May 1918 for 10 days Field Hosp. Langres, France. Returned to duty. Fracture and dislocation of 10, 11th and 12th dorsal vertebrae on Nov. 11, 1918. Hosp. #24 for 2 months. Laminectomy performed at #24. Transferred to B.H.

Defendant's Pre-Trial Exhibit No. 1—(Continued) #90—there until March 1919. Then to Savennay in Hospital. There until May 1919. Then to U.S.A. to Grand Central Palace for a week. Then to B.N. at Fort Douglas from June 1st to Aug. 23, 1919. Then to Fort Des Moines, Iowa until Oct. 15, 1919. Then to U.S.Gen. Hosp. at Ft. Sheridan. There until discharged S.C.D. May 22, 1920. Post service: No serious illness. No operations. Has had weakness in back. Industrial History: Entered Vocational training Jan. 9, 1922. Training interrupted Jan. 15, 1924. Family History: Mother living and well. Father dead, cause unknown. 2 brothers living and well. 1 sister living and well. 2 sisters dead, cause unknown. Industrial: Prin. prewar occupation: Laborer at $20. week. Post war: Unemployed May 1920 to Jan 1, 1922. Vocational training, Seattle, Jan. 9, 1922 to Apr. 28, 1924—still training. Claimant considers wages lower due to sickness.

10. Present complaint: Stiffness and weakness in small of my back if I sit long at a time or walk very far. I am unable to do any lifting or hard work.

11. Physical examination: Fairly well nourished. Height in shoes 70½". Weight without coat 135. Temp. 97.8. Pulse 72. Head: Skull and scalp negative. [173] Eyes: Referred to Dr. Joiner, Chief, E.E.N.T.Section who reports: "V.R. 20/30 plus .75 sph with plus 1.00 c x .15— 20/15. L. 20/20—3 plus .75 sph with plus .75 c x 1.80— 20/15. Conjunctiva, cornea, media, fundi and optic nerves negative. Diagnosis: Compound hyperopic Astigmatism.

Defendant's Pre-Trial Exhibit No. 1—(Continued) Recommendations: None." Ears, nose and throat—negative. Teeth: Report of Jan. 18, 1924 as follows: "1 missing tooth (0023) 2 Dental Caries (0229) Gingivitis (0730) X-Rays were taken of teeth. Recommendations: Dental Treatment." Has had no dental work done since. Neck: No palpable lymph glands. Thyroid negative. Chest: Long, narrow and flat. Mobility good and equal. Lungs: Apparently normal on palpation, percussion and auscultation. No rales. Heart: Apparently normal, in tone, rate and boundary. No thrill. Abdomen: Negative to inspection, no masses, tenderness or rigidity. No hernia. Pelvis and Perineum: Negative. No hemorrhoids. Genitalia: Negative. Extremities and Joints: Scar on back extending from the 10th dorsal spine along the right spinal border to the upper margin of the sacrum 8¼" long, due to operation following fracture of spine, presents a kyphosis with its apex at 11 x 12 dorsal vertebrae. There is a complete rigidity of the spine involving the lower dorsals and the lumbar spine, there is an atrophy and atony of the back muscle, erector spinae group. Movements of spine as follows: From 0 erect position, forward bending 30 degrees, backward beinding 10 degrees—laberal bending right and left 10 degrees. There is complaint of weakness and pain in both loins which is well substanciated by the condition of musculature of the back. There is a very slight scoliosis in the region of 10, 11 and 12 dorsal vertebrae. Referred to Dr. Baumgarten, A.S.Roentg. for X-Ray of dor-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

sal and lumbar spine, who reports: "Dorsal and lumbar spine: In the lateral view there is shown a moderate kyphosis with the maximum angle at the first lumbar. The bodies of the first and second lumbars especially the former, are deformed; the first is wedge shaped. In the anteroposterior view the dorsal curvature of the spine toward the right is accentuated and there is a sharp curvature of moderate degree toward the left. From these films it appears that the spinus processes and laminae have been removed of 1st lumbar. On the posterosuperior and left side of the body of the first there is a bony projection extending upward for a distance of one-half inch. This is three sixteenths of an inch in width. There does not appear to be any activity in this region at the present time." The right foot presents a marked hallux valgus with callosity over the distal head of 1st metatarsal. Also a thick callous at the base of the 5th tow. There is flat foot bilateral 1st. degree. Nervous System: Negative. Skin: Negative. Urinalysis: (4-28-24) Amber, clear, acid, sp. gr. 1.026. Albumen trace. Sugar negative. Casts—few hyaline. Pus cells few. Epithelia few. Red cells none. Mucous shreds. Cylindroids few. Crystals—uric acid. Urinalysis: (5-3-24) Volume in 24 hours 1½ quarts. Straw, clear, acid, sp. gr. 1.012. Albumen trace. Sugar negative. Casts—rare hyaline. Pus cells occasional. Epithelia few. Red cells occasional. Mucous shreds. Cylindroids—few.

12. Diagnosis:

Defendant's Pre-Trial Exhibit No. 1—(Continued)

(1) 3082 Fracture of spine.
(2) 0106 Ankylosis bony of spine.
(3) 0161 Atony muscles of back.
(4) 0169 Atrophy muscles of back.
(5) 0344 Curvature of spine (Kyphosis).
(6) 0346 Curvature of spine (Scoliosis).
(7) 0662 Hallux valgus.
(8) 0587 Flat feet bilateral 1st degree.
(9) 0209 Callosities.
(10) 0023 Missing teeth, one.
(11) 0229 Dental Caries, two.
(12) 0630 Gingivitis.
(13) 0156 Astigmatism, compound, hyperopic.
(14) 0061 Albuminuria. [174]

13. Prognosis: Guarded.

14. Is claimant able to resume his prewar occupation, in your opinion? No.

15. Is claimant bedridden? No. 16. Is claimant able to travel? Yes. 17. Do you advise hospital care? No. 18. Will claimant accept hospital care? Not offered. 19. Is an attendant necessary? No. 20. Is his physical and mental condition such that vocational training is feasible? Yes. 21. Did you examine the man yourself on this date? Yes.

22. Place Seattle, Washington. Date April 28, 1924.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Name /s/ D. A. SEIBERT, M. D.
Title Medical Examiner.

Report of Physical Examination
Claims and Rating Board #2
C. No. 430 162

1. Claimant's name Mahoney William V Address 475 Clay St. Portland, Ore.

2. Examined Seattle, Wn. Feb. 11, 1925. 3. Age 28. 4. Color white.

6. Rank and organization Pvt Co. 3 Serv. Bat. Army School.

7. Date of induction July 15, 1917 of discharge from service May 22, 1920 married Prin pre-war occupation: Laborer.

8. Brief outline of claimant's disability since service: Overseas from Dec. 15, 1917 until May 15, 1919. Had Flu May 1918 for 10 days Field Hosp. Langres, France. Returned to duty. Fracture and dislocation of 10, 11th and 12th dorsal vertebrae on Nov. 11, 1918. Hosp #24 for 2 months. Laminectomy performed at #24. Trans. to B.H. #90—there until Mar. 1919. Then to Savennay in Hosp. There until May 1919. Then to U.S.A. to Grand Central Palace for a wk. Then to B.N. at Ft. Douglas from June 1st to Aug. 23, 1919. Then to Ft. Des Moines, Iowa, until Oct. 15, 1919. Then to U.S. Gen. Hosp. at Ft. Sheridan. There until discharge S.C.D. May 22, 1920. Post Service; no serious illness. No operation. Has had weakness in back. Stiffness and weakness

Defendant's Pre-Trial Exhibit No. 1—(Continued) of back and pains in loins when I sit for any length of time.

10. Physical examination: Fairly well nourished and developed. Height 70½. Weight 135. Pulse 76. Temp. 98. Head and Scalp apparently normal. Eyes and Ears referred for special examination "VR 20/30 -2 plus 75 sph with plus 100c x 15 equals 20/20. L 20/20 plus 75 sph with plus 75c x 180 equals 20/20. Conjunctiva, Cornea, Media, Fundi and Optic Nerve negative. HR w 40/40 cl 20/20 wh 15/15 V 20/20 Ears negative L w 40/40 cl 20/20 wh 15/15 V 20/20 Diagnosis; Coupound Hyperopic Astigmatism.

Nose, Throat, Neck and Thyroid normal. Thoras —broad and deep. Lungs—negative to percussion, auscultation, palpation, inspection. Heart, normal in outline PMI 5 interspace within nipple line, no murmurs, no thrills, rhythm regular. Abdomen, negative to inspection, no palpable masses, no tenderness, no rigidity no free fluid in abdominal cavity, [175] no distention. No G.I. complaint. Inguinal Rings and Genitalia., Rings normal, no hernia, no varicocele, no atrophy of testicles, no enlargement of cords. No hemorrhoids. Extremities, bones and joints, No limitation of motion of joints. No enlargemenet or redness of joints, no crepitation. Scar on back 8½" long beginning just to right of 10 dorsal vertebrae and extending downward P. O. for operation following fracture of spine, well healed. There is a marked rigidity of muscles of spine with atrophy. Rigidity of spine

Defendant's Pre-Trial Exhibit No. 1—(Continued)
involving lower dorsal and lumbar, movements of spine limited forward bending 200 deg. Backward 170 deg. Lateral bending about 10 deg. either way. Complaint of pain in loins due to condition of musculature of back. There is a slight scoliosis to rt. in lower dorsal region, and a kyphosis in lower dorsal and upper lumbar—see x-ray-below. Flat fee bilateral 1st degree Hallux Valgus rt. Callosity right foot. X-ray of lower dorsal and lumbar spine, by R. C. Baumgarten, A.S. Roent.

"The ninth, tenth and eleventh dorsal appear normal with the exception of the interspaces which are narrowed and the articulating surfaces show slight irregularity as noted in the A.P. view. The twelfth dorsal and first lumbar show what appears to be an absence of the spinous processes and lamina. There is bony ankylosis existing between the twelfth dorsal and the first lumbar. There is slight angulation to the left with the apex at the first lumbar. The second, third, fourth and fifth lumbar appear fairly normal. No laberal view taken."

Nervous System, normal. Urinalysis: yellow, clear, acid, sp.gr. 1020. Albumen and sugar negative. Teeth referred to Dental Section; 1 missing tooth, 1 carie. Recommendations; Dental treatment."

General diagnosis:

0156 Compound Hyperopic Astigmatism. 0023 missing tooth—1

0229 carie 1. 3082 Fracture of spine.

0106 Ankylosis bony of spine. 0161 Atrophy muscle of back.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

0344 Curvature of spine—Kyphosis.
0344 Curvature of spine—Scoliosis.
0662 Hallux Valgus—rt. 0587 Flat Feet bilateral 1st deg.
0209 Callosities rt. foot.

Prognosis: Permanent.

Is claimatn bedridden? No.

Is claimant able to travel? yes Do you advise hospitalization? No Will claimant accept hospital care? not offered.

Is an attendant necessary for travel? No.

Did you examine the claimant yourself? Yes.

Address of Examiner Seattle, Washington.

/s/ W. E. JOINER
EENT Spec.
/s/ O. EDWARDS
Member
/s/ D. E. SEIBERT
Med. Exam.

Recommendations: Dental treatment. [176]

Report of Physical Examination #98
Claims and Rating Board #2
C-No. 430,162

1. Claimant's name Mahoney, William V. Address 334 5th St. So., Portland, Oregon.

2. Examined Seattle 4/16/26 4/16/26

3. Age 30 4. Color wh.

6. Rank and organization Pvt. Co. 3 Serv. Batt. Army Sch.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

7. Date of induction 7-13—17 of discharge from service 5-22-20 married.

8. Brief outline of claimant's disability since service: same.

9. Present complaint: Pains thru back & hips when I sit down and get up—am all stiff.

10. Physical examination: Temperature 98, pulse 78, time of day A.M. height 70½ inches; weight 132; Did you weight the claimant? Yes.

Vision: Hearing: All appear normal.

Fairly well nourished & developed. Skull and scalp An.

Eyes and nose referred. Ears & throat An. Neck & thyroid An.

Thoras long broad & flat. Heart and lungs An. Abdomen An. No G. I. complaint. My dz A & rechim An. Nervous system An for reflexes. No romberg. Bones & joints & extrem. All An. except back & feet referred.

General Diagnosis:

1. Astigmatism Comp. hyperopic.
2. Deviated septum of nose.
3. Cicatrix back P.O.
5. Curvature of spine (Kyphosis & Scoliosis).
6. Hallux Valgus bilateral.
7. Flat foot bilateral.
8. Fracture of spine.
9. Ankylosis spine.
10. Callosities rt. foot.

Prognosis: Unfavorable for improvement.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Is claimant bedridden: No Is claimant able to travel? yes.

Do you advise hospitalization? No Did you examine the claimant yourself? Yes.

Name of Examiner A. D. Sampson Title M.E.

Address of Examiner Seattle, Wn. [177]

U. S. Veterans' Bureau
Date 4-16-25
Name Mahoney, Wm. V.
C# 430162 Class MH

Dr. Joiner
Specialist,

Please examine the above named ex-service man and report your findings and recommendations below. The following is noted for your information:

eyes & nose

By authority of the Regional Manager, AG

Findings:

R 20/20 plus .78 sph with plus 1.00 cx 15 equal 20/20.

L 20/20 plus .75 sph with plus. 75 cx 180 equals 20/20.

Conj. cornea, med. fundi op. nerves neg.

Nose septum deviated to left not obstructive.

Spur septum right.

Diagnosis:

1. Comp. Hyp. astigmatism.
2. Deviated septum.
3. Spur septum.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Recommendations: None.

W. E. JOINER
Specialist, U.S.V.B.

April 16, 1926 Date of Examination.

Mahoney, Wm. V. C. 430162

13. Prognosis: Unfav. for improvement.
14. Able to res. pre-war occ.? no.
15. Bed ridden? no.
16. Able to travel? yes.
17. Advise hospital care? no.
18. Will he accept hosp.?
19. Attendant necessary? no.
20. Feasible? yes.

% Disability: 60%.

Handicap: Yes Code A.

D. A. SEIBERT
U. S. Veterans' Bureau
Seattle, Washington
Date 4-16-26
Name Mahoney, Wm. V.
C# 430162

Dr. Seibert
Specialist, U. S. Veterans' Bureau

Please examine the above named ex-service man and report your findings and recommendations below.

The following is noted for your information: Back & feet.

By authority of Regional Manager.
AG[178]

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Findings: Scar 8½" beginning to Rt. of 10th dorsal vertebrae and extending downward. P.O. for fracture of spine, scar is well healed. There is rigidity of muscles of back with atrophy also rigidity of spine in lower dorsal and lumbar.

Movements as follows: Forward to 165, backward to 170, Lateral movement about 10 degrees to rt. & left. There is a marked Kyphosis from 10th dorsal to lower lumbar and a slight scolosis in lower dorsal. Referred to x-ray 2/11/25.

Both feet are flat 1 degree, no symptoms. Bunions on both feet. The Rt one is somewhat tender. Left no complaint.

Small callous under head of 5th metacarpel Rt.

0285 Cicatrix back, P.O.

0169 Atrophy muscles of back.

0344 Curvature of spine (Kyphosis & Scolosis.

0662 Hallux Valgus bilateral.

0587 F. F. one degree bilateral.

3082 Fracture, spine.

0106 Ankylosis spine.

0209 Callosities Rt. foot.

0139 Arthritis chr. dorsal & lumbar spine quiescent.

D. A. SEIBERT
Specialist, U.S.V.B.

Apr. 16 - 26 Date of examination.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

U. S. Veterans' Bureau

Regional Office, Seattle, Washington.

Date 4-17-26

Sir:

You are requested to make X-ray examination as instructed below:

Name Mahoney, Wm. V. Address Portland, Ore.

Compensation 430162 Parts Requested Complete dorsal and lumbar spine A.P. & lateral — Symptomatically fixed.

By authority Regional Manager

D.A.S.

Date 4-19-26 Parts taken Dorsal Spine.

No. and size of plates #11372

Record of Findings:

Dorsal Spine: shows a double, mild grade scoliosis; the curve to the left in the upper dorsal and to the right in the lower. In the A.P. view the shadows of the bodies are overlapped and the interspaces are narrowed; in the lateral view the interspaces, especially the mid-dorsal, are narrowed.

Lumbar Spine: The 12th dorsal and 1st lumbar show an absence of the lamina on the right side and lamina and pedicles on the left side.

From the appearance of these films there has been a partial destruction of the disc surfaces between the 12th and first and first and second; there is some new bone production in these same regions. The 4th lumbar shows a division of the spinus [179] process. Sacro-iliacs are negative.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Conclusion: There is chronic infilammatory condition involving the entire dorsal and lumbar spine, in addition to the deformity (post-operative), involving the 12th dorsal and 1st lumbar.

R. C. BAUMGARTEN
X-ray Consultant.
Attending Specialist—Roentgenology.

REPORT OF PHYSICAL EXAMINATION

Compensation

11-1-32 C-No. 430 162

1. Claimant's name Mahoney, William V. Address 621 - 6th St., Portland, Oregon.

2. Examined U.S.V.H., Portland, Ore., 10-24-32.

3. Age 36 Color wh. Birthplace So. Dak. Race wh Color of eyes blue Color of hair brown.

4. Hieght — inches.

5. Permanent marks and scars other than described below: None.

6. Rank and organization Pvt. Co. 3, Serv. Bat. Army School. Date of induction 7-5-17 of discharge 5-22-20.

7. Origin and date of incurrence of disability as alleged by claimant:

Fracture of spine and residuals occurred in service. Convulsions, 5 or 6 in past year. Unconscious at these times. No other complaints.

8. Brief medical and industrial history:

No treatment of any kind.

9. Present complaint:

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Pain and soreness in spine at times. Occasional convulsions with loss of consciousness and followed by vomiting.

10. Temperature 98 Respiratory rate: Standing 18, sitting 17; immediately after exercise 23; 3 minutes after exercise 18; Pulse rate: Standing 72, sitting 72; immediately after exercise 125; 3 minutes after exercise 72.

Any arrhythmia of pulse? no Blood pressure: Systolic 150, diastolic 90.

11. General appearance Good; nutrituon good; muscular development fair; carriage erect; posture good; gait good.

12. Eyes: Normal.

13. Ears. Auditory canals: Normal: yes Discharge? no. Ordinary conversation heard: Right 20 plus feet; left 20 plus feet.

14. Nose, throat, sinuses: Normal: Yes.

15. Cardio-vascular system: Normal? Yes Except;— [180] He has a mod. deg. of Hypertension, cause undetermined.

16. Respiratory system: Normal? Yes.

17. Digestive system: Are mouth, teeth, gums, stomach, intestines, lives, gall bladder, and rectum normal? Yes.

18. Spleen; lymphatic glands: Normal? Yes.

19. Nervous system: Are brain spinal cord, peripheral nerves, and mentality normal?

See Special NP Report Attached.

20. Genito-urinary system: Kidneys, bladder, prostate, penis, testicles, normal? Yes.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

21. Rheumatism: Articular or muscular? Articular. What joints affected? Spine. Swelling, crepitus, atrophy deformity, limitation of motion, ankylosis? A residual of injury to spine resulting in fracture; spine is painful to percussion.

22. Hernia: Inguinal, femoral, ventral, umbilical? No.

23. Hyrocele? No Varicocele? No.

24. Varicose veins? No.

25. Pes planus (flat or weak foot)? No Pes cavus (hollow foot)? No High arch? No Hallux valgus (bunion)? No

26. Skin: No.

27. Residuals of gunshot wounds or other injuries: Sustained a fracture of dorsal and lumbar spine in service and had an operation to repair fracture. Spine is rigid with a moderate backward curvature of dorsal and upper lumbar. Neck movement limited. An x-ray ordered. A curvew PO scar back.

28. Evidence of effects of past or present vicious habits: None.

29. Laboratory examinations?

Wass & Kahn: Negative.

Comp. Fix. Test GC.: Positive.

Urinalysis: Reaction, neutral; Fp.gr. ——; no alb nor sugar; rare hy. casts.

Neuropsychiatric Examination

Mahoney, William V.

C-430,162

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Portland, Oregon, October 24, 1932

Statement: "Hospitalized for flu during service, and for injury when a pile of potato sacks fell on me, that was the day the Armistice was signed, and I was in the hospital until the next spring, then sent home on the hospital ship Mercy, and sent to hospital in N. Y. for about two weeks, from there sent to Ft. Douglas, Salt Lake City, and there until August or September, from there sent to Des Moines, and from Des Moines to Ft. Sheridan where I remained until discharged from army, S.C.D. [181] May 22, 1920. No hospitalization since discharge but in the last year I have had four or five spells, of some kind, the first one about a year ago, I was walking along the street, my ears started to ring, and I had some sort of a convulsion. I woke up in St. Vincent's hospital, remained there about 24 hours, was confused when I first came to and couldn't even tell them my name or where I lived. The next spell didn't last quite so long, I was on the street that time too. I felt like if I could get away from everybody and be alone I could fight it off, but I tried that the next time and it didn't work. I had one spell in the house, I live with my brother-in-law, and not long ago I had another one outside, I don't know how it happened but I hurt muself behind left ear, I was walking down 11th street the last I remember, and when I came to I was down on 6th street, and the blood was running down my neck. I was confused, and wouldn't even have been able to tell anyone my address, but

Defendant's Pre-Trial Exhibit No. 1—(Continued)

could have walked there all right. The last spell was 2 or 3 weeks ago, I woke up down in the Emergency Hospital, I was sick to my stomach, vomited, and the muscles in my neck were sore, also muscles in abdomen were sore. I sleep pretty good, but it seems like I have the spells at night sometimes too, they wake me up, I might have a mild attack for a couple of nights in succession, then none for several weeks. The spell wakes me up and then I try to fight it off. I don't set the bed or dribble in my clothes, and don't bite my tongue during the attacks. My appetite isn't very good. Bowels seem to be regular, move once a day. Sexually I'm all right. I have a dull ache in my head after the spells, and feel confused, don't think I could even tell anyone my name afterwards." etc.

Neurologic: A slender, fairly well developed and nourished white male, manifesting no disturbance in gait, station, speech or coordination, except that he has a little more difficulty standing on right foot in placing opposite heel to knee. Back appears to be rigid. Musculature is in fairly good state of physical nutrition. No atrophy nor paralysis. There are no constant tremors, but at times both lower extremities tremble, more mraked on the right. Sensory System, there are no complaints of pain on palpation or percussion over any area. No evidence of nerve tenderness, and no impairment of perception. Vibratory sense is normal in both lower extremities. Reflexes, deep and superficial are all present and within normal limits, except that

Defendant's Pre-Trial Exhibit No. 1—(Continued) knee jerks are obtained by suprapatellar percussions, bilateral, and while heel jerks appear to be diminished, there is a rapid movement in both ankles, like a very fine sustained clonus. Sphincters intact. No toe extension reflexes found. Patellar clonus is sustained, bilateral. Kleppelweil not found. Cranial Nerves, small, vision and taste are unimpaired. Patient complains of roaring in both ears just before seizures. 5th and 11th are negative. Mimicry, movements of tongue and deglutition are undisturbed. Eyes are not prominent; fields, grounds and movements are normal, normal cupping, no nystagmus. Pupils are equal in size, regular in outline, react normally to light and in accommodation. Thyroid Gland is negative. Hands and feet are warm and dry, palms are not calloused. In the Mental Field, except for apprehension, and self-concern, nothing obnormal is elicited. He is quiet, pleasant and cooperative.

Conclusion: This patient for years has been rate as permanently disabled on account of atrophy, muscles of back; curvature of spine, with ankylosis; and arthritis, chronic. We have demonstrated some abnormality in both lower extremities, more marked in the right, and patient gives a history of seizures, [182] during which he loses consciousness.He states that right upper extremity has a feeling of heavy helplessness before he loses consciousness, at the same time there is a roaring in the ears, and then oblivion. After he first finds himself it requires several moments before he becomes oriented. This

Defendant's Pre-Trial Exhibit No. 1—(Continued)
history highly suggests epileptoid seizures, and inasmuch as the first occurred about a year ago, they should be due to some organic disease or to intoxication. He denies the use of alcohol or other drugs. We recommended lumbar puncture for spinal fiuid study, but patient declined, stating he had plenty of trouble with has back already. We feel unwarranted at this time in concluding any diagnosis. We examined to patient the difficulties arising out of his unwillingness to have a spinal fluid study, and he stated that should seizures persist, or any new disturbances arise, he would report to his hospital for further study.

Diagnosis: 1095—Undiagnosed. (Alleged seizures.)

F. J. ERNEST, M.O.
Neuropsychiatrist

FJE/aih

Veterans Administration
Portland, Oregon

Xray lab. Date: 10/24/32

You are requested to examine the below captioned beneficiary with reference to xray entire spine for residuals of fracture.

H. M. READ, M.D.

CONSULTANTS REPORT

Date: Oct. 25, 1932

Six flat radiographs of the entire spine, upper 2/3 of the pelvis, A.P. and lateral projections: The bones making up these parts are in good alignment

Defendant's Pre-Trial Exhibit No. 1—(Continued)

except for the spine which shows a double scoliosis with convexity to the left in the upper lumbar region and to the right in the lower dorsal region. The bones have good contour and density except in the regions mentioned. There is a deformity of the first lumbar vertebra with compression of the anterior portion of the body, with signs of bony destruction, and partial fusion of the bodies of the 12th dorsal and 1st and 2nd lumbar vertebrae. These conditions have the appearing of being the result of an old injury. There is no other frank evidence of bony destruction or bony production in the cervical, dorsal or lumbar spine. The 5th lumbar vertebra is partially sacralized. Both sacroiliac joints show increased density with some signs of fusion on the left.

THOMAS S. CARRINGTON
Consultant.

Name	Classification	C-Number	
Mahoney, Wm. V.	VB	430-162	HMR

[183]

Veterans' Administration
Portland, Oregon

MEMORANDUM TO PATIENTS

Date: Oct. 24, 1932

This office is desirous of obtaining a record of your industrial history since your discharge from the service. Will you please fill out the blank below, listing all work you have done since discharge,

Defendant's Pre-Trial Exhibit No. 1—(Continued)

sign the blank and Hand To Your Surgeon when completed.

1. What was your occupation when you entered the service? Plaster helper.

What wages were you receiving? Day $4.00.

2. List all the work you have done since discharge under the following heads:

Haven't been working since placement training after getting of University of Washington.

WILLIAM V. MAHONEY
Signature of Patient

H. M. READ
Signature of surgeon-witness

30. Additional: None.

1—1095 N.P. Undiagnosed.

2—3081 Fracture, lumbar vertebrae, 1st and 5th and 12th dorsal, healed with fusion and ankylosis and loss of 75% of dorsal and lumbar bending.

3—3008 Arthritis, chr. traumatic, dorsal and lumbar.

32. Is the claimant bedridden? No Is he able to travel? Yes Does he need hospitalization? No Is an attendant necessary for travel? No Is the claimant mentally competent or incompetent? Comp Do you consider a guardian necessary? No Did you examine him yourself? Yes Date 10-24-32.

Name of examiner. H. M. Read Title Examiner.

33. Statement by claimant. My answers to Question 9 have been read to me, and I hereby certify

Defendant's Pre-Trial Exhibit No. 1—(Continued)

that the complaints recorded are all that I am suffering from, to the best of my knowledge and belief.

Signature of claimant

/s/ WILLIAM V. MAHONEY.

We, the undersigned, have examined the above named claimant, reviewed his records, concur in the above diagnosis, and it is our opinion that he should be rated on a permanent basis in accordance with R & PR 1105 for disabilities above, not including 1095.

/s/ DR. H. M. READ
/s/ DR. F. J. ERNEST
/s/ DR. W. W. FRANK. [184]

REPORT OF NEUROPSYCHIATRIC EXAMINATION

Admission Examination
Admitted April 5, 1934
C-430 162

Claimant's Name Mahoney, William V. Married.

Last service, rank, and organization: Pvt. Co. 3, S. Bat. Army School.

Present Address: Veterans Adm. Facility, American Lake, Washington.

Legal Residence: 2405 Sixth Street South, Portland, Oregon.

Age: 37 Color: White. Occupation: office work.

Date of induction: July 13, 1917. Date of Discharge: May 22, 1920.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Family History Father, Thomas Mahoney, born in Illinois. Occupation, bricklayer and plasterer. Health supposed to have been good. Died in 1919 at the age of fifty-five, cause not known to patient. Mother, maiden name Joanna McWharter, born in Minnesota, was very religious. Died in 1933 at the age of seventy-five, supposed to have been ill for some time in a hospital prior to death. She died from cancer. Brothers: Three, ages forty-three, thirty-six, and thirty-four, living and apparently in good health. One sister living and in good health, at the age of forty.

Marital: Wife's maiden name, Clara Swanson, age forty, born in Minnesota, common schooling. Married claimant May 27, 1920. Health is fair. No children.

Claimant denies any mental or nervous diseases in family and there is no history of same.

Personal History Claimant was born at Flandreau, North Dakota, April 11, 1896. Supposed to have finished the eighth grade in school, then helped his father and learned the trade of plasterer, from 1913 to 1915. In 1915 he took up the occupation of auto mechanic, at which he worked until he enlisted in the army in 1917. Patient claims to have had the usual diseases of childhood, no sequelae. Denies any serious diseases, accidents, or injuries prior to service. Denies venereal diseases, use of drug, admits the moderate use of alcoholics, especially beer. Uses tobacco. Denies any conflicts with

Defendant's Pre-Trial Exhibit No. 1—(Continued)

the law prior to service. Got along well with everybody, enjoyed various sports.

Military History Patient enlisted at Minot, North Dakota, July 13, 1917. Served as Private, Third Company, Service Batn., Army School, and was discharged honorably May 22, 1920, S. C. D., at Fort Sheridan, Illinois, due to arthritis, chronic, traumatic, following an injury. Patient states that while overseas at Landres, France, on November 11, 1918, he was delivering commissaries, and a stack of sacked potatoes fell on him, injuring his back. States he was hospitalized at Landrew, France, where he received what was evidently an Albee operation on his spine. States that for three months following this operation he was in a frame, following this he was in a cast for sixty days, and then wore a brace until some time during May, 1919. He was returned to the States in the Hospital Ship Mercy. He was first hospitalized in New York, and from there he was sent to Fort Douglas, where he remained a short time, then went [185] to Des Moines, Iowa. From there he was sent to Fort Sheridan, where he remained until he received his discharge on May 22, 1919. Denies any other illnesses, accidents, or operations while in service.

Post-war History After discharge from the service claimant was returned to Minot, North Dakota, but owing to the condition of his back he was unable to work. He was granted vocational training by the Government, then came to Portland, Oregon, where he entered training as an accountant Janu-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

ary 29, 1922, continuing until May 8, 1924. Part of this training was at the University of Washington, Seattle, Washington, and part of it at the Benhke-Walker School, Portland, Oregon. Since completing his vocational training it is evident he has not been gainfully employed. He has lived off his compensation, which was sixty percent to July 1, 1933, and forty percent since that time, supplemented by his wife's earnings. He has also done odd jobs of bookkeeping here and there, wherever he could get them. States that he has been unable to do any other work where it was necessary for him to use any great amount of strength, as his back would not permit it. The history shows that when he was not occupied what little money he did have he squandered in gambling and dancing.

History of Onset From the social history as given by the wife it is evident that he first started having seizures over five years ago. Claims wife does not know the exact date when they started. At first they occurred only two or three times a year and they would be months apart, but during the last two years they have been coming on more frequently. States he has two or three in one week and then will go for a month or more. They occur any time during the day or night without any regularity as to time. States he loses consciousness anywhere for a few minutes to ten or fifteen, and lies in a sort of daze or stupor at times, sleeping for a coupoe of hours, then gets up and seems to be quite normal again. Complains of the soreness of

Defendant's Pre-Trial Exhibit No. 1—(Continued)

his muscles after a seizure. The wife states that at times he has some warning of seizures coming on but not always enough time to permit him to lie down. She gives a very accurate account of the character of the seizures. She states that he loses consciousness, turns pale and white, head twitches to one side, and the whole body gets rigid and stiff. At times he bites his tongue. No soining of clothing during attacks. Aside from the seizures, which come on at irregular intervals, she states that his back bothers him a great deal, although he has been fairly well physically.

During the last few years he has become more irritable and quarrelsome and she states he drinks to the point of becoming intoxicated in recent years. When he is under the influence of liquor he becomes especially quarrelsome and becomes so abusive toward his wife that she fears he will do her bodily harm. A short time prior to his being sent to the hospital at Salem, Oregon, she had to leave home because she was afraid of him. States he came to see her almost every day at her work. He was inclined to be suspicious and jealous of his wife's friends.

The officers who picked her husband up stated to the wife that they found him wandering around in a daze and there had been a report that he tried to or talked of trying to jump into the river. His condition finally became such that he was committed to the Oregon State Hospital, Salem, Oregon, [186] on March 9, 1934. The dazed condition he

Defendant's Pre-Trial Exhibit No. 1—(Continued)

was in when picked up on the street by the officers was probably due to a seizure.

Diagnosis at the Oregon State Hospital was epileptic deterioration, undoubtedly traumatic in origin. He remained in that institution until his transfer to the Veterans Administration Facility, American Lake, Washington, on April 5, 1934.

Industrial History From the time of his discharge from the army up until 1922 the patient apparently did very little if anything, as he was recuperating from his back injury. In 1922 he was granted vocational training as an accountant, studying this until 1924. Following completion of this course he evidently did not make any business connections and did not earn a living but depended entirely upon his wife's earnings plus his compensation from the Government.

Hospitalizations Oregon State Hospital, Salem, Oregon, March 9, 1934, to April 5, 1934. U. S. Veterans Administration Facility, American Lake, Washington, April 5, 1934, remaining.

Present Complaint "These seizures that I have and also my back when I get run down and tired. At such times I have a great deal of discomfort in my back and it is hard for me to do anything."

Physical The claimant is a fairly well nourished and developed white male, height 68½ inches, weight 153 pounds. Head and scalp apparently normal. Scanty hair, blue eyes. Eyes, ears, nose and throat apparently normal. Chest is broad, deep, good,

Defendant's Pre-Trial Exhibit No. 1—(Continued) free and equal expansion. Lungs normal to palpation, percussion, and auscultation. Heart is normal in position and size, rhythm is regulars, no murmurs or thrills. Blood pressure 130/80. Superficial arteries soft and compressible. Abdomen is flat, muscles firm, no masses or tenderness elicited. G. U. negative. No hernia. No hemorrhoids. Bones, joints, and extremities are normal, with the exception of flat feet, second degree, bilateral. There is also a bony abnormality from the ninth dorsal vertebra down, and over this area there is a linear scar, postoperative, 1/8 inch wide and 9 inches long, due to an Albee operation which was performed on his spine, resulting from an accident while overseas. This operation was performed November 11, 1918. There is almost complete lack of motion from the ninth dorsal to the second lumbar, due to fixation. Skin is clear, moist, free from disease.

Neurological All deep and superficial reflexes of the upper and lower extremities present, equal, and active. There is no evidence of cranial nerve involvement. Deep and superficial sensation apparently normal. Coordination tests performed accurately, no pathological reflexes demonstrated.

Laboratory Examination

Sputum, April 6, 1934: Character, saliva. Tubercle bacilli and blood not demonstrater. [187]

Urinalysis, April 7, 1934: Quantity, 760cc. Color, amber. Reaction, acid. Odor normal. Sp. gr. 1025. Albumin, extremely faint trace. Sugar

Defendant's Pre-Trial Exhibit No. 1—(Continued) negative. Mucus not demonstrated. W. B. C., occasional. R. B. C. not demonstrated. Casts, hyaline, occasional. Epithelia, many. Cylindroids, spermatozoa. Bile, negative. Bacteria, not demonstrated. Crystals, not demonstrated. Indican, three plus positive. Acetone, negative. Diacetic acid, negative. Beta-hydroxybutyric acid, negative. Special examinations of urine: Total solids 58.25 gms. per 1000cc. Total acidity 500cc N/10 NaOH per 1000cc.

Blood Wassermann, April 11, 1934: Complement fixation test for syphilis, negative. Cholesternized: Kolmer St. 18 hr. 8°C, 00 negative. Exts. (U. S. V. V. 37°, ½ hr., negative.

Mental It is evident from the social history as given by the claimant's wife that there has been some mental disturbance noted for at least the past five years and possibly longer. For the past five years the patient has been having seizures which, as described, are epileptic in character. These seizures at first occurred only a few times a year, but during the last year or two they have become much more numerous, more severe, and of longer duration. There has also been an increasing irritability and antagonism toward his family. He has become somewhat careless in his appearance and habits and while formerly he was more or less sociable, of late years he has been inclined to be seclusive, staying by himself, frequenting pool halls and gambling houses. At one time he thought that his wife was untrue to him and the history shows that his own morals are not above reproach. It was evidently after

Defendant's Pre-Trial Exhibit No. 1—(Continued)

he had one of these seizures in Portland, Oregon, that he was picked up by the police in a dazed condition on the street. He showed evidence of laceration to the side of the tongue, which he evidently had bitten during an attack. He was irritable, confused, and was committed to the Oregon State Hospital at Salem, Oregon, at which place he was diagnosed epileptic deterioration, probably traumatic in origin.

While at the hospital in Salem he had no further seizures. He was transferred to this facility on April 5, 1934, and to date has been free of any suggestion of epileptic seizures.

The patient is oriented for time, place, and person. Memory is good for remote events, somewhat defective for recent. His retention of school knowledge is fair. He has some insight into his condition in that he realizes the nature of his disability and he also claims to realize that he is better off when he is working at some form of light occupation. His judgment is somewhat defective and he shows a mild degree of deterioration, possibly epileptic in character. He is inclined to be rather shifty, circumstantial, and somewhat evasive when questioned. He denies the use of intoxicants. The social history and the statements of various people for whom he has worked during the past few years show that at times he drinks to excess, particularly during these last few years.

Since his admission to this facility he has shown no evidence of an active psychosis, although he does

Defendant's Pre-Trial Exhibit No. 1—(Continued)
show some slight degree of deterioration. He denies the existence of delusions, hallucinations, or persecutory ideas, and none are elicited. He is apparently well in touch with his surroundings and takes an active interest in his various forms of occupational therapy and is well up in current events.

[188]

Summary It is quite evident from the history of this case that his difficulties started, possibly, during the war, when he received a severe injury to his back, which necessitated an Albee operation on the same. Since discharge from the army he has completed a course of vocational training in accountancy, but did not make any particular use of same in securing steady employment. The wife states that approximately ten or twelve years ago she noticed a decided change in his personality, that he was beining to be irritable and fault finding. She states that he would wake up in the morning in a dazed condition. The wife said that the first seizure occurred approximately five or six years ago, but she thinks he must have had them before from the way he acted. At first the seizures were very infrequent, only three or four a year, but during the past two or three years they have become much more frequent. He has been more irritable prior to and following seizures and would be dazed for a considerable period of time following them. The history shows that the last seizure he had was just prior to his commitment to the Oregon State Hospital, Salem, Oregon, March 9, 1934, at which time

Defendant's Pre-Trial Exhibit No. 1—(Continued)

he was picked up by the police, who stated he was wandering about in a dazed, confused manner. While in the Oregon State Hospital he was not observed in any seizures. He was transferred to this facility April 5, 1934, and to date has had no seizures here.

Diagnosis 1. Epilepsy with deterioration (from history) —0526.

2. Arthritis, chronic, traumatic, dorsal and lumber spine—0139.

3. Fracture, lumbar vertebrae, first, fifth, and twelfth dorsal, healed with fusion and ankylosis—3082.

4. Flat feet, bilateral, second degree —0587.

5. Cicatrix, over spine, post-operative, non-symptomatic—0285.

Remarks The patient is partially sociabley and economically inadaptable by reason of the above diagnosis. It is recommended that he have a further short period of hospitalization to verify diagnosis No. 1, inasmuch as he has had no seizures since being in this facility. He is considered competent and not insane at this time.

Place Veterans Administration Facility, American Lake, Washington.

Date Staffed May 10, 1934.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Approved:

/s/ T. F. NEIL,
T. F. NEIL, M. D.,
Clinical Director.

/s/ F. L. WRIGHT,
F. L. WRIGHT, M. D.,
Neuropsychiatrist.

/s/ L. F. WOOD,
L. F. WOOD, M. D.
Neuropsychiatrist. [189]

LETTERGRAM

This form is to be used instead of the telegraph for urgent communications when it can reach destination in time to effect its object.

For use in the mails it should be inclosed in Lettergram envelope and forwarded by first mail.

In reply refer to H2-1913 Office American Lake Washington

Subject: Mahoney, William C.
C-430 162 Date June 13, 1934

To: Manager
Veterans Administration Facility
Marquam Hill
Portland, Oregon
(Attention—Chief Attorney)

Dear Sir:

This will advise you that the above captioned claimant was discharged from the records of this Facility as of June 10, 1934 in accordance

Defendant's Pre-Trial Exhibit No. 1—(Continued)

with Para. 7319, R. & P. Medical, AWOP more than forty-eight hours.

Inasmuch as the patient is considered competent and this is his second elopement within a short period, it is felt that this should be considered a disciplinary discharge.

The diagnosis in this case is epilepsy with deterioration (from history).

Very turly yours,

GEO. R. STALTER, M. D.,
Manager.

Veterans Administration Facility
American Lake, Washington
July 18, 1934.

Manager
Veterans Administration Facility
Marquam Hill
Portland, Oregon
In reply refer to:
H5b-1913
Mahoney, William V.
C-430,162
Attention: Psycriatric Social Worker

Dear Sir:

We are enclosing herewith, in accordance with R. & P. Medical, 7085, paragraph (f), copies of social service history in the case of the above named who was discharged from this [190] Facility as of June 10, 1934, being absent without permission for

Defendant's Pre-Trial Exhibit No. 1—(Continued)

more than forty-eight hours. Diagnosis is Epilepsy petit mal.

This claimant while in the hospital was quiet and cooperative and was given a diagnosis of Epilepsy with deterioration (from history) on May 10, 1934. While in the hospital he was obesrved carefully and on May 25, 1934, while working in the mess hall he suddenly stood staring into space, became pale, perspired and seemed somewhat dazed for about five minutes, then went on with his work. A few days after this he had a similar attack and both these attacks resembled Epilepsy petit mal. On May 22, 1934, the patient left the kitchen in Building No. 2 with a food cart, taking it to Building No. 3, said he would return immediately. He did not return during that day. He went to Portland, Oregon, and his wife reported that he would return to the hospital which he did voluntarily and he was placed on a closed ward and reassigned to his occupational therapy assignment in the kitchen. He was well thought of by all the employees in the building and on the ward and was allowed the privilege of going to and from the ward unaccompanied. On June 10, 1934, about 8:20 A. M. he was seen going to the baseball field and the attendants reported that he was playing ball with the other patients until ten o'clock to return to his occupational therapy assignment in Building No. 2, but he failed to arrive there. A telegram was sent to his wife of his being absent from the hospital without permission and on the 12th of June she

Defendant's Pre-Trial Exhibit No. 1—(Continued)

notified by telegram that he had been home and left. He was neat in personal appearance, quiet, cooperative, pleasant and congenial. He was oriented in all three spheres, his memory was excellent for remote events but seemed somewhat defective for recent events. His retention of school knowledge was fair, but an insight into his condition and realized the nature of his disability.

Owing to his tendency to leave the hospital without permission, it was evident that his judgment was defective and at times he would be somewhat evasive when questioned closely but during the period of time he was at this Facility he showed no evidence of active psychosis and had only two petit mal attacks. Owing to his tendency to continually elope, he was discharged as A.W.O.P. more than 48 hours under Paragraph 7348 Regulations and Procedure, Medical.

It was the opinion of the Staff that the patient should be discharged under Paragraph 7348 Regulations and Procedure (Medical) on account of his tendency to continually leave the hospital without permission. He was partially socially and economically inadaptable by reason of his petit mal attacks. Inasmuch as these seizures had been very light he was considered competent and not insane at the time of his discharge.

Two copies of a social report covering the onset of patient's disability were received from your of-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

fice under date of April 19, 1934, in response to our request of April 10, 1934.

Very truly yours,

GEO. R. STALTER, M. D.,

Enc. Manager. [191]

Veterans Administration Facility

Portland, Oregon.

Dr. Ernest Date: 10-10-35.

You are requested to examine the below captioned beneficiary with reference to need for Hosp. care.

L. O. CAREY, M.D.

CONSULTANTS REPORT

Date: 10/10/35

This patient is not intoxicated but he is psychotic at this time. Not fully oriented, sits gazing into space, talking as tho in conversation and expression changes in accordance. Tip of tongue has been bitten and bleeds, clothing is badly soiled. He was picked up by police because he was wondering about the streets, muttering to himself, and could give no account of his actions. He is delusional and hallucinated, incompetent at this time. He should have t'm't under N.P. supervision on a closed ward.

Diag. 0525 Epilepsy Grand & Petit mal with Psychotic episodes. Psychotic at this time.

Recom. Returned to American Lake Hospital and guardianship.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Mahoney, Wm. V.	P-105C	430162
Name	Class	C-No.

F. J. ERNEST,
Consultant.

Copy of this report made and referred to American Lake with P-10. H.O. 10/10/35

REPORT OF NEUROPSYCHIATRIC EXAMINATION

Admission Examination

Admitted: October 11, 1935
C-430,162

Claimant's name Mahoney, William V. Married.

Service, rank and organization: Pvt., Co. 3, Service Bat., Army School.

Present address: Veterans Admin. Facility, American Lake, Washington.

Legal residence: College and Sixth, Portland, Oregon.

Age: 39 Color: White Occupation: Office worker.

Date of induction: July 13, 1917 Date of discharge: May 22, 1920. [192]

For family history, personal history, military history, post-war history, and history of onset see admission examination dated April 5, 1934.

Continued History of Onset On May 22, 1934 the patient left the hospital without permission but returned voluntarily. On June 10, 1934 patient again eloped and was discharged as of that date

Defendant's Pre-Trial Exhibit No. 1—(Continued) in accordance with Paragraph 7348, Regulations and Procedure, Medical, being absent without permission more than forty-eight hours. He was readmitted to this Facility October 11, 1935 from the jail in Portland, Oregon, where he had been for several days. He was picked up by the police because he was wandering about the streets muttering to himself and could give no account of his actions.

Present Complaint "I have those spells but I'm all right now and can go out and take care of myself."

Physical While male, height 69½", weight 140 lbs., well developed and fairly well nourished. He has brownish red hair, blue eyes and ruddy complexion. There is a longitudinal, linear scar over the dorsal and lumbar spine 10½ inches long. This is post-operative following injury while in Service. He has a small scar on right side of forehead from injury received by falling during one of his seizures. He has a large bunion at the junction of the first tarsal-metatarsal joint, great toe, right foot, large toe over-riding the second toe. He has flat feet, second degree, which are non-symptomatic. Throat is normal. Tonsils were removed in 1912. Nasal septum is deviated to the left. Teeth: Few are absent, others are in very good condition. There are no endocrinopathies. There is no evidence of venereal disease and there is no history of venereal infection at any time. Heart outlines in usual position, relative area of dullness about normal, no mur-

Defendant's Pre-Trial Exhibit No. 1—(Continued) murs or thrills. Pulse sitting 72, after exercise 88, three minutes after 72. No sclerosis or varicosities. Blood pressure is 120/80. Chest is long, broad and of medium thickness. Movements are deep and equal. Lungs show no pathlogy. Tactile fremitus is normal over all areas. Percussion resonance shows no unusual changes. No harsh breath sounds or rales are heard on deep expiratory cough. Abdomen is scaphoid; no masses, no areas of tenderness or rigidity. No hemorrhoids.

Neurological Eyes: Vision right 20/35, left 20/35. Both are corrected to 20/20 by a plus .50 S. Diagnosis, Hyperopia, mild. Pupils are 4 mm. in diameter and react normally to light and accommodation. There is no muscular imbalance. Fundi are normal. He has a chronic conjunctivitis. Senses of taste and smell are normal. Cutaneous sensibilities and stereognostic sense are normal. Organic reflexes are well controlled, except during seizures when it is stated that he has incontinence. Deep reflexes—patellar, Achilles, elbow and wrist—are all present and equal and of normal intensity. No ankle clonus. Superficial reflexes—cremasteric, abdominal, corneal and pharyngeal—are all present and normal. No Babinski. Gait is not involved. Speech: Has a rather hesitating drawl. Articulation is rather clear. Coordination tests are well performed. Romberg is negative. He has fine tremors of extended fingers, none of tongue. [193]

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Laboratory Examinations

Sputum, 10-12-35—Character, saliva. Tubercle Bacilli not demonstrated. Blood not demonstrated.

Urinalysis, 10-15-35—Qauntity 940 cc. Color, amber. Reaction, acid. Odor, normal. Sp. gr. 1019. Albumin, heavy trace. Sugar, negative. Mucus, not demonstrated. W.B.C., occasional. R.B.C., not demonstrated. Casts, not demonstrated. Epithelia, occasional. Bile, negative. Bacteria, not demonstrated. Crystals, ca oxalate one plus, amorphous phosphates one plus. Indican, four plus positive. Acetone, negative. Diacetic Acid, negative. Beta-hydroxy-butyric Acid, negative. Total solids 44.27 gms. per 1000 cc. Total Acidity 330 cc N/10 NaOH per 1000 cc.

Blood Wassermann. 10-14-35—Complement Fixation Test for Syphilis negative. Cholesternized: Kolmer Std. 18 hr. 8°C 00 negative. Exts. (USVB 37°, ½ hr. negative.

X-Ray of Chest and Spine. 10-28-35—A. P. view of dorsal and upper lumbar shows old injury to 12th dorsal with fusion and ankylosis. No evidence of injury to the 5th. No evidence of arthritis.

X-ray of chest shows a moderate degree of increased density of each central area. Hilar shadow contains very few small calcifications. Apices and peripheral zones are clear. Diaphragmatic shadows are smooth and regular.

Mental When admitted to the hospital patient was in fairly good contact and correctly oriented.

Defendant's Pre-Trial Exhibit No. 1—(Continued) However, he was a little hazy about what caused his re-admission to the hospital. He said that he was told that he was picked up on the streets of Portland as he had had some seizures. He had a bruised area on his head which he saw was caused by a copy striking him with a billy. Speech was somewhat irrelevant and he rambled somewhat about his in-laws. He thought they were jealous of him because he was getting compensation. He co-operated very well for the routine of admission. Remembered some of the nurses and attendants from his previous hospitalization. He now helps some with the ward work and writes very nice letters home. However, at times he appears rather dull and asks quite frequently to be allowed his liberty again. Says he will not run away. Is neat and clean about his person and habits. Has a good appetite. Rests very well at night. He complains some of his back hurting him. Says it interferes with his work, especially if there is any stoping to be done. According to the attendant who brought him here from Portland he had a petit mal attack while on the road and attempted to grab the chauffeur. It was stated that he had been suffering three or four seizures each day. Patient at times has been very delusional. He states that they have been shooting stuff at him for a year or so, that it was the city employees and looked like the same guy that did the shooting in Wyoming when they tried to make him confess. He says that people could tell what he was thinking about before he

Defendant's Pre-Trial Exhibit No. 1—(Continued)
even uttered a sound. Before a seizure he gets dizzy and hears sounds in his ears as though there were two people talking. After being discharged from this hospital June 10, 1934 he did very little work of any kind. However, he says he was on jury duty in Portland for one month, receiving $3.25 per day. He saw service on two civil suits. He says he looked for jobs a few times while [194] out but could not find any work. He spent the time visiting his friends. He says that his friends are on the up and up and not just common ordinary trash. Some are barbers, tailors and lawyers. He admits having drunk some beer occasionally. Says he drank very little hard liquor, that he felt good several times but was not drunk. Patient states that he probably had about thirty seizures during the time he was absent from the hospital, that he usually has incontinence during his seizures and it is hard for him to think for quite some time. Thoughts come slowly and during this examination his cerebrations were extremely slow the greater part of the time. He says that he feels dazed sometimes for almost a whole day. He doesn't know whether this is from the jar of his fall or from the seizure itself. Asked whether he was persecuted while at home he replies that he was not. Says that when he went to the bank there was on particular fellow who was always there and he thought this fellow followed him around, probably with the idea of trying to get his money. However, to obviate this he would always go directly

Defendant's Pre-Trial Exhibit No. 1—(Continued)

from the bank and pay his debts. Also, he states that those fellows came to his door just prior to his coming to the hospital, talking loudly, "mugged" him and took his finger prints. He thinks possibly this could be partially his imagination. He does not think they had any authority to do this without his having committed a crime. After they took him to jail they kept him until he was returned to this hospital.

At the present time patient says he feels fine. His memory is defective for both remote and recent events. He gives the correct date of his arrival here. He is unable to give the month or day of month that he left the hospital. Gives date of birth correctly. Is unable to give the dates of his enlistment or discharge from service. Says the World War began June or July 1917. Wilson was President then, Roosevelt now. He is unable to give the date of his marriage or wife's birthday. Correlation of dats and facts and retention are rather poor. He is very good in mathematics; subtracts successive 7's from 100 with only few mistakes. Says the Mississippi is the largest river in the United States. Names all five great lakes. He is unable to give the population of the U.S. Says population of Chicago is one hundred thousand, New York one hundred fifty thousand. States in the Union, forty-eight. Pershing was the general in the World War. Civil War was fought in 1876. General Jackson was one of the main generals. Spanish American War was in 1898. Teddy Roose-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

velt was the main officer. There is no flight of ideas. He admits auditory hallucinations at times. However, they are not bothering him at this particular time. He says that sometimes they are men and women both. Their voices are very accusatory in nature. He also thinks that at times he has been doped and his mind can be read. He is not so sure that this is purely imagination. He says he is never depressed, that he feels different now and does not let the blues get him down. The only thing he worries about, he says, is the lock and key on the hospital doors to keep him from his freedom. He says, "If you just let out so I can walk around I will be all right and take care of myself but just listening to those nuts on the ward talk would make any guy nervous." He has some insight into his condition as he realizes he has seizures but he has been unable to exercise good judgment.

Summary White male, 39 years of age, born April 11, 1896 in South Dakota, married, office worker by occupation. He was re-admitted to this hospital October 11, 1935. His first admission was on April 5, 1934 and he was discharged June 10, [195] 1934, as being absent without permission. He had two petit mall attacks during his first hospitalization. There is nothing of particular interest in the family history except that his mother died of cancer. Birth and early life were uneventful. He made a fairly good adjustment up until the time he entered service. He received an injury during service and was discharged on an S.C.D. as the

Defendant's Pre-Trial Exhibit No. 1—(Continued)

result of this injury, since which time he has been drawing compensation. He had vocational training in 1922 but was never able to take the proper advantage of this training. He did not make a very good economic adjustment at any time. The first seizures recorded were in 1929. They were of more or less frequency and he became quite irritable and showed considerable deterioration and letdown in his mental field which led up to his hospitalization. He was drinking to some extent. However, it is not believed that this played any part in causing the seizures. At his injury was during service in 1918 the onset of the seizures is probably too long afterwards to be wholly the result of this injury. Some of his seizures are described as being of the grand mal type while others are petit mal attacks. The last seizure he had was while on the road from Portland to this hospital the day of his admission, which was of a petit mal nature. Physical findings are a 10½ inch linear scar over the dorsal and lumbar vertebrae, post-operative; large bunion at junction of first tarsometatarsal joint of right great toe with an over-riding large toe, same foot; flat feet, bilateral, second degree, non-symptomatic; deviation, nasal septum; absence of teeth, acquired. Also, he has mild hyperopia and chronic conjunctivitis. Neurological findings are negative except for fine tremors of extended fingers and a rather slow, hesitating, drawling speech. At times when patient is quite delusional he admits auditory hallucinations. He

Defendant's Pre-Trial Exhibit No. 1—(Continued) has memory defects. Power of retention is reduced. School knowledge is fairly well retained. He has a typical epileptic personality with a rather slow drawling speech. He has some insight into his condition but is unable to exercise good judgment.

The interval history given by patient's wife states that he is not a user of hard liquor but does drink quite a little beer at times. It also states that on October 7, 1935, just prior to his admission here, he suffered six very severe seizures of the grand mal type, was untidy from both bowels and kidneys during two or three of the seizures, had stertorous breathing and was cyanotic. Each seizure lasted for about thirty minutes. He was irritable at times and confused for about three or four hours after the seizures. During the time he was home he fell on the street several times, injuring himself but not seriously. Dr. Zigler of the Medical Arts Building in Portland, Oregon, the wife says, has witnessed the patient in these seizures. She also states that he was confused when picked up by the police on the street. This was following a seizure.

On November 29, 1935, while out for a walk on the hospital grounds, patient suffered a seizure. He was talking to the other patients and suddenly fell, striking the right side of his face on one of the part benches, and received several abrasions. He was confused for about five minutes afterwards. He was cyanotic during the seizure but there was no tonic or clonic convulsive movements. He was brought back to the ward and after his arrival on

Defendant's Pre-Trial Exhibit No. 1—(Continued)
the ward he was unable to realize that anything unusual had happened and did not know that he had had a seizure. [196]

Diagnosis

Psychosis, epileptic, deterioration—1398
Conjunctivitis, chronic—0312
Hyperopia, mild—0777
Deviation, nasal septum—0417
Flat feet, second degree, non-symptomatic—0587
Hallus valgus, right great toe—0662
Cicatrices, non-symptomatic—0285
Absence of teeth (7), acquired—0023.

Remarks It is the opinion of the Staff that the patient is incompetent, socially and economically inadaptable and requires hospitalization.

Place Veterans Administration Facility, American Lake, Washington.

Date Staffed October 29, 1935

Approved:

/s/ T. F. NEIL, M. D.
Clinical Director
/s/ J. M. WORTHEN, M. D.
Neuropsychiatrist
/s/ C. A. HUNSAKER, M. D.
Neuropsychiatrist

Report of Neuropsychiatric Examination
Discharge Examination
Admitted: October 11, 1935
C-430,162

Name Mahoney, William V. married.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Service, rank, and organization: Pvt., Co. 3, Service Bat., Army School.

Legal residence: College and Sixth Streets, Portland, Oregon.

Age: 39. Color: White. Occupation: Office worker.

Date of induction: July 13, 1917. Date of discharge: May 22, 1920.

For family history, personaly history, military history, post-war history, and history of onset see admission examination dated April 5, 1934 and October 29, 1935.

Present Complaint The only complaints the patient made before he left the hospital was that he was not allowed parole privileges.

Physical No change in physical condition since examination of October 29, 1935. Last weight was 159 lbs.

Neurological No change in neurological condition.

[197]

Laboratory reports See examination dated October 29, 1936.

Mental Patient was in fairly good contact. He was clearly oriented but he was somewhat hazy at times in regard to his past. During his period of hospitalization he had several minor epileptic seizures and one that was nearly grand mal in character. At times he was quite delusional, has admitted auditory hallucinations. He has a slow drawling hesitating speech. His power of retention

Defendant's Pre-Trial Exhibit No. 1—(Continued)

is reduced although his school knowledge is fairly well retained. At times he was irritable, especially after a seizure and was confused sometimes for three or four hours afterwards. He was usually pleasant to talk to and always promised that he would never leave the hospital without permission, but during his previous hospitalization he went AWOP. He has some insight into his condition, that is that he has seizures, his judgment is defective.

On January 9, 1936 the patient was transferred to Ward 61-B and on January 17, 1936 he left the hospital without permission. Search was made for the patient but he could not be located. He is therefore being discharged in accordance with Paragraph 7319, R. and P. Medical, having been AWOP more than 48 hours.

Diagnosis

Psychosis, epileptic, deterioration—1398
Conjunctivitis, chronic—0312
Hyperopia, mild—0777
Deviation, nasal septum—0417
Weak feet, second degree, non-symptomatic—0587
Hallux valgus, right great toe—0662
Cicatrices, non-symptomatic—0285
Absence of teeth (7) acquired—0023

Remarks It is the opinion of the Staff that the patient is incompetent, socially and economically inadaptable, and requires supervision.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Place Veterans' Administration Facility, American Lake, Washington.

Date of discharge January 17, 1936.

Approved:

/s/ T. F. NEIL, M. D.
Clinical Director
/s/ C. A. HUNSAKER, M. D.
Neuropsychiatrist
/s/ J. M. WORTHEN, M. D.
Neuropsychiatrist

(1/28/36 No change not referred for action. J. J. C.) [198]

REPORT OF NEUROPSYCHIATRIST EXAMINATION

Admission Examination
Admitted: Feb. 29, 1936

C-430,162

Name Mahoney, William V. Married.

Service, rank and organization: Pvt. Co. 3, Ser. Bat. Army School.

Present address: Veterans Adm. Facility, American Lake, Wash.

Legal residence: 6th and College Sts., Portland, Oregon.

Age: 39 Color: White Occupation: Office worker.

Date of induction: 7-13-17 Date of discharge: 5-22-20.

For complete family history, personal history,

Defendant's Pre-Trial Exhibit No. 1—(Continued) military history and post-war history and onset, see examination of Oct. 29, 1935.

On January 17, 1936, this patient was working on an outside detail with ten other patients. He asked permission of the attendant to go to the lavatory and failed to return. Attendant reported that he immediately made a search, after patient's failure to return, but he had evidently escaped into the nearby brush. He was re-admitted to this facility Feb. 29, 1936, accompanied by a friend, but coming in voluntarily. His story agreed essentially with the history as given by his wife when she was interviewed by a social worker in Portland, who reports as follows: Patient felt that police were after him with trucks and motorcycles and behaved in such a peculiar manner that it was though best for him to return to the hospital. He seemed willing to return and a friend volunteered to accompany him. Wife further stated that he had frequent seizures during the time he was in Portland, fell on the street a number of times and about a month before his admission here was picked up on the street following a seizure, taken to Emergency Hospital with a badly bruised head and face, and was sent from there to Good Samaritan Hospital. According to wife he only drank an occasional beer while out of the hospital, but she states he was very much confused and imagined that all sorts of things were after him. For that reason it was thought best to return him to their hospital. Patient was not living with his wife at the hotel

Defendant's Pre-Trial Exhibit No. 1—(Continued) because her quarters were too small but he occupied a room across the street and it was their intention to get an apartment together providing he had been able to stay out of the hospital.

Physical Patient is a well developed white male. Weight 144 lbs. Height 69″. There is a small scar on the bridge of his nose and a linear scar ½″ on the upper lip, due he states from a fall on the East-side Bridge in Portland, during a seizure. Otherwise his physical examination is essentially the same as of Oct. 29, 1935.

Neurological Pupils react to light and accommodation and all extra-ocular movements are normal. Cranial nerves are intact. Motor and sensory functions are normal. Babinski and Romberg are negative. [199]

Urinalysis 3-2-36—Character-mucoid; Tubercle Baccilli not demonstrated; Blood not demonstrated.

Urinalysis 3-2-36—Quantity 750cc; Color—amber; Reaction—acid; Odor—normal; Sp. gr. 1014; Albumin—trace; Sugar—negative; Mucus—not demonstrated; WBC occasional; RBC and Casts not demonstrated; Epithelia—occasional; Bile—negative; Bacteria and Crystals not demonstrated; Indican, Acetone, Diacetic Acid and Beta-hydroxybutyric Acid all negative. Total solids 32.62 gms. per 1000 cc. Total Acidity 480 cc. N/10 NaOH per 1000 cc.

Blood Wassermann 3-2-36—Complement Fixation Test for Syphilis negative. Cholesternized: Kolmer

Defendant's Pre-Trial Exhibit No. 1—(Continued)
Std. 18 hr. 8°C (00) negative. Exts. (USVB 37°, ½ hr. negative.

Mental Patient is in good contact and correctly oriented. He says he is a little bit confused about many of the details during his absence but knows that he had numerous seizures and that on his last seizure he bruised himself severely on his upper lip and nose. He admits that he thought police with sirens and motor trucks were following him around town and that he often thought he was being shadowed. He states that he tried to get work several times during his period away from the hospital but could not secure the same. He claims he did no drinking outside of a few glasses of beer and this has been verified by his wife. Says he spent most of his time walking around the streets and visiting old friends. At present he states he is gradually getting over his fear that people are after him and that he feels he should be allowed parole of the grounds. He has been confined on Ward 6-C where he has made a good adjustment and is a good ward worker.

Summary This is patient's third admission to this hospital. Thought police were after him with trucks and motorcycles so came in voluntarily. Frequent seizures at home. None since return. Hallucinations and confusion on admission, also dissipated appearance, now disappeared. Started having seizures in 1930. These occurred two or three times a week, now not so often with lon-

Defendant's Pre-Trial Exhibit No. 1—(Continued)
intervals without seizures. Both nocturnal and diurnal. At times has an indescribable aura, at other times no aura. Some mental and moral deterioration. History of moderate amount of alcoholism which apparently bears no relation to seizures.

Diagnosis

Psychosis, epileptic, deterioration—1398
Conjunctivitis, chronic—0312
Hyperopia, mild—0777
Deviation, nasal septum—0417
Weak feet, 2nd degree, non-service—0387
Hallux valgus, rt. great toe—0662
Cicatrices, non-symptomatic—0285
Absence of teeth, acquired—0023

Remarks It is the opinion of the Staff that patient is incompetent, socially inadaptable and in need of hospitalization.

Place Veterans Administration, American Lake, Washington. [200]

Date Staffed April 15, 1936.

/s/ A. F. JOHNSON, M.D.
Associate Medical Officer

Approved:

/s/ T. F. NEIL, M.D.
Clinical Director

/s/ N. C. MACE, M.D.
Neuropsychiatrist

/s/ C. L. WHITMIRE, M.D.
Neuropsychiatrist

Defendant's Pre-Trial Exhibit No. 1—(Continued)

REPORT OF NEUROPSYCHIATRIC EXAMINATION

Discharge Examination
Admitted: Feb. 29, 1936
C-430-162

Name Mahoney, William V. Married.

Service, rank and organization: Pvt. Co. 3, Ser. Bat. Army School.

Legal residence: 6th and College Sts., Portland, Oregon.

Age: 40 Color: White Occupation: Office worker.

Date of induction: 7-13-17 Date of discharge: 5-22-20.

For family history, personal history, military history and post-war history and onset, see examination of Oct. 29, 1935.

Present complaint The only complaint the patient made before eloping from the hospital was that he should be allowed parole privileges and these had not been granted.

Physical No change since examination of April 15, 1936.

Neurological Essentially the same as of April 15, 1936.

Laboratory See examination dated April 15, 1936.

Mental Patient was in good contact, well oriented. Following his previous elopement he had

Defendant's Pre-Trial Exhibit No. 1—(Continued)

frequent seizures and was readmitted to the hospital on Feb. 29, 1936. While in Portland felt he was being pursued by motorcycles and fire trucks and according to his sister, "imagined all sorts of things were after him." He came back to the hospital voluntarily, accompanied by a friend. After his admission he was cooperative on the ward, in good contact but had a tendency to be lazy in the occupational therapy shop. Was oriented in three spheres. Said he did not remember much of the elapsed time following his previous elopement. Another patient reports that he made a grill key at the O.T. shop in view of escaping. This key was found hidden on the ward.

On May 11, 1936, one of the personnel left the back [201] gate of the O.T. shop open, while carrying some material from the shop. At that time particular employee did not know there was a locked ward patient in Bldg. 18. Evidently the patient saw his opportunity to escape and although a search was made for him and the police notified he was not apprehended, and is therefore being discharged in accordance with Para. 7319, R. & P. Medical, AWOP more than 7 days.

Diagnosis

Psychosis, epileptic, deterioration—1398
Conjunctivitis, chonis—0312
Hyperopia, mild—0777
Deviation, nasal septum—0417
Weak feet, 2nd degree, non-service—0387

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Hallux valgus, rt. great toe—0662
Cicatrices, non-symptomatic—0285
Absence of teeth, acquired—0023

Remarks It is the opinion of the Staff that patient is incompetent, socially inadaptable and in need of hospitalization.

Place Veterans Administration Facility, American Lake, Washington.

Date of discharge May 11, 1936.

/s/ A. F. JOHNSON, M.D.
Associate Medical Officer

Approved:

/s/ T. F. NEIL, M.D.
Clinical Director
/s/ N. C. MACE, M.D.
Neuropsychiatrist
/s/ C. L. WHITMIRE, M.D.
Neuropsychiatrist

12-4-37mgd Per 2507 from A. Nelson
11-10-37

REPORT OF PHYSICAL EXAMINATION

Discharge

Date of admission: October 29, 1937.
Date of discharge: November 5, 1937.

C-430 162

Mahoney, William V.
2728 Broadway, Portland, Oregon. [202]
Examined VAF Portland, Oregon Nov. 5, 1937.
Birthplace—South Dakota April 11, 1896 Age—41

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Pvt. 3rd Co. Serv. Bat. Enl. 7-13-17 Disch. 5-22-20.

Personal History: Back broken—Nov. 11, 1918.

Epileptic spells since about 1930.

Tonsillectomy at age 12.

Present Illness: The patient states that during the service he suffered from intermittent attacks of generalized extreme fatigue especially of the lower extremities, "as tho I had walked 150 miles". There were never any mental changes or convulsions. That these attacks would last about a day followed by complete recovery only to reappear in about 3 to 4 weeks. These attacks continued until about 1927 when they began to be associated with actual convulsive seizures—never any incontinence of feces or urine. He has injured his tongue on numerous occasions and has been told that there is a frothy sputum about the mouth during one of these attacks. His aura is a feeling of extreme fatigue. At times he is able to ward off these attacks, by resting quietly, especially alone. On the day of admission the patient had a seizure and was brought to his hospital. After about 3 hours observation, the patient felt very much better and wanted to go home. This was thought to be alright; but after leaving the hospital he suddenly had another seizure and fell striking his head on some sharp object resulting in a laceration scalp wound, and he was again returned to this hospital and admitted. During the service the patient reecived a back injury resulting in a fracture of some of the lumbar ver-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

tebrae and he also states that he was operated on the same day as the injury. That he hasn't much "strength" in his back and that there is limitation of motion.

Special Nose Exam—Dr. J. L. Ballou—11-2-37:

Complaint: Difficult nasal breathing.

Findings: The conjunctiva is almost normal. Septum moderately deflected to the left.

Diagnosis: 0417 Deviation nasal septum.

Operation report, repair of lacerations, scalp, attached.

Copy of Dr. F. J. Ernest's N.P. Exam. 11-4-37, attached.

Copy of phys. exam. made on admission, attached.

Oct. 29, 1937

Lacerations, occipital region, scalp.

Same.

The scalp around the wounds was shaven and cleaned with green soap, iodine and alcohol. The wounds were closed with several interrupted sutures of dermal, collodium dressing applied, patient was then given intra-dermal skin test and tetanus anti-toxin and gas bacillus anti-toxin administered.

Dr. J. R. Brown

Miss Frye

None. [203]

208 Repair of Lacerations, Scalp.

Good

Well developed, well nourished white male. Admitted directly to the ward from the stretcher for the repair of a recent laceration of the scalp. Ex-

Defendant's Pre-Trial Exhibit No. 1—(Continued)
amination of the scalp revealed two lacerations on the right side of the occiput, extending down to the cranium. One of these lacerations was 1½" long and the other was ½" long. There was a large hematoma in this area. The operator was unable to palpate any evidence of fracture of the skull. Patient's pupils were equal in size and reacted well to light. At the time of admission he was irrational but rapidly regained his mental faculties and there was no clinical evidence of intracranial injury.

OK

GEO. E. PFEIFFER
VA Portland, Oregon
JRB/djb

Mahoney Wm.

October 30, 1937

General Appearance: The patient is a fairly well nourished, somewhat poorly developed white male who is in a somewhat stuporous condition. He does not appear acutely ill. Hair, reddish brown with frontal alopecia. Eyes, blue. Height 68½ inches. Weight, 141 lbs.

Head and Neck: There is an incised and contused wound, recent, of left occipitoparietal region about 2 inches long. There is another incised wound adjacent and parallel to this one that is about one inch long. There are numerous old healed scars of the neck, head and nose said to be due to injuries during pervious seizures. Eyes: There is a mild chronic conjunctivitis present. Pu-

Defendant's Pre-Trial Exhibit No. 1—(Continued) pils normal in size and react well to light and accommodations. Ears: Apparently normal; no discharge.

Nose: The nasal septum is deviated markedly to the left.

Mouth: Many missing teeth. Oral hygiene good. Tonsils out. Multiple old healed scars of the tongue. Neck: Old healed scar. No cervical adenopathy.

Cardio-Vascular System: B.P. 116/74. Pulse 88/min. sitting—100/min. standing—not exercised due to condition of patient. The heart is normal in size; regular with no murmurs. There is a slurring of M-1. No dyspnea, cyanosis, or dema.

Respiratory System: Expansion equal. No areas of hyperresonance or impaired resonance. Breath sounds are B.V. throughout with no rales or other adventitious sounds.

Abdomen: Normal contour. No scarring, rigidity, or tenderness. Liver and spleen normal in size. No masses or other palpable evidence of pathology.

G.U.: Scrotum and contents normal. No penile pathology. No tenderness over the kidnesy to flat percussion. No bladder tenderness. Rectal: External hemorrhoids: No other pathology noted. Hernia: None.

M. & N.: See special report.

Bones and Joints: There is a bilateral Hallux Valgus which is more marked on the right. There

Defendant's Pre-Trial Exhibit No. 1—(Continued) is a bilateral pes planus, 2nd degree, symptomatic. There is a mild to moderate lordosis of the spine with about ¼ limitation of motion. There is a linear P.O. well healed scar i½ inches long along the lower [204] dorsal and upper lumbar vertebrae. There is considerable tenderness to gentle percussion over the lower dorsal and upper lumbar vertebrae.

Mahoney, William V. Hosp.Sub.Par. NSC WW 430 162 24511.

October 30, 1937

Diagnosis:

1. Wound, recent, incised and contused, occipitoparietal region of scalp, left —3127—3131
2. Psychosis, epileptic, deterioration —1398
3. Arthritis, chr., traumatic, dorsal & lumbar spine —3008
4. Fracture, lumbar vertebrae 1, 5, 17 dorsal, healed with fusion & ankylosis —3082
5. Cicatrix, P.O., spine —0285
6. Cicatrices, old, healed, traumatic, multiple, head and neck —0285
7. Chronic onjunctivitis —312
8. Deviated nasal septum —0417
9. Missing teeth —0023
10. Hallux Valgus, bilateral, more marked rt. —662

Defendant's Pre-Trial Exhibit No. 1—(Continued)

11. Pes Planus, 2nd degree, bilateral—0587
12. Hemorrhoids, external, mod. —705

W. E. MYERS, M.D.

Mahoney, William V. Hosp.Sub.Par. NSC WW 430 162 24511

Psychosis, Epileptic Deterioration

11/4/37

Statement: "I was down town last Friday, and felt a seizure coming on, so I turned around and started back home, but didn't get there. I woke up here in the hospital. You put me to bed, and I stayed till afternoon, then started home again. It was nice, and I thot I would walk. Down here on Terwilliger, I felt another spell coming. Tried to get off the highway, and when I came too was back in the hospital, and am here yet. I would like to go home. I always feel better outside. When these spells come on, I get off by myself and ward the severe attacks off, but if I am out in a crowd, they come on hard. Since I am here, I would like to have you put in a good word with my guardian. I need clothes and more money. He doesn't seem to see it that way, and it makes it very unpleasant for me," etc.

Examination: We saw this patient last Friday forenoon, October 29th. He had been placed on a bed in the Receiving Ward, and was somewhat confused following seizure. About 1 o'clock he reported to our office; said he was going out into the air and thot he would be all right. We saw no reason for his remaining, and let him go. About ½

Defendant's Pre-Trial Exhibit No. 1—(Continued) hour later he was brot back to the hospital, having had another seizure on the highway. He had traumatixed his scalp during first seizure, and during second seizure he had injured the same area more. [205] Surgical dressing was applied. He was given Luminal, gr 1½ BID. He has had no more seizures, and scalp wound has practically healed. He is an AWOL patient from American Lake. We previously diagnosed his case as Eiplepsy, with psychotic episodes. He is incompetent, and requires guardianship. Apparently between attacks he is capable of caring for himself in the ordinary environment. No reason for hospital treatment at this Facility is present at this time.

Diagnosis: 1398—Psychosis, Epileptic deterioration.

Recommendations: Discharge from hospital.

F. J. ERNEST,
Neuropsychiatrist.

Mahoney, Wm. 24511

Special Orthopedic Exam—Dr. J. R. Broun—Nov. 4, 1937:

Patient states that in 1918 a sack of potatoes fell on his back and he sustained a compound fracture of several vertebrae as a result of this injury. An emergency operation was performed the day of the injury. States that at present his back is weak and all movements involving the lower part of his back result in pain. Examination: Gait & Posture: He walks without any evidence of a lump.

Defendant's Pre-Trial Exhibit No. 1—(Continued) The dorsal spine has a moderate kyphosis, resulting in a marked postural defect. Examination of the spine reveals a vertical sop. scar well healed, over the lower dorsal and upper lumbar spine. This scar is 8 inches long and 1/3 inch in width. There is a marked kyphosis in the region of lower dorsal and 1st lumbar vertebrae. There is a scoliosis of the dorsal spine with the convexity to the right. All movements of the dorsal and lumbar spine are limited 60 gs. with subjective pain.

Impression: Scar, healed, P.O. over lower dorsal & upper lumbar spine; Fracture, old, healed, 12th thoracic & 1st lumbar & 5th lumbar with marked deformity and loss of bone structures and ankylosis of 1st lumbar & 12th dorsal.

Lumbo-dorsal scoliosis & kyphosis, marked; Limitation of motion, lumbar & dorsal spine; Arthritis, lumbar spine, traumatic, mod. severe.

Xray Dorsal & Lumbar Spine: Skull & Chest—
Dr. V. L. Minehart—

Nov. 3, 1937: All sinuses, sella and rest of skull normal. No shadow suggesting fracture detected. Trachea, heart, aorta, diaphragm and bony framework apperently normal. No shadows suggesting fracture detected. Lungs normal. Thoracic vertebrae: Slight lateral curvature of the lower half, convexity toward the right. The body of the last shows marked deformity, The lower third is deformed and a large bony hook is seen on its anterior edge. The entire body of the 1st lumbar is

Defendant's Pre-Trial Exhibit No. 1—(Continued)

deformed. It is wedge-shaped, narrow portion anterior. Large bny hooks are seen on the anterior edges. The appearance suggests old compression fractures of both bodies, the 1st lumbar is the worst. The posterior arches of both are gone, apparently removed at operation. This includes the spines of both vertebrae. There is a very marked kyphosis at this level, convexity posterior. There is also a slight lateral curvature with convexity toward the right. The bodies of all of the lumbar vertebrae are separated at the anterior edges more than usual and the normal lumbar curve is increased. Bony deposits are seen about the posterior articulations of the last two, and the spine of the last is deformed, suggesting old fracture. Sacrum, sacroiliac joints, hip joints and rest of pelvis normal.

[206]

Blood Count—10-29-37: RBC 4160,000; WBC 10,900; polys. 83-4 staffs; lymp. 14; mono. 2; eos. 1; Hb 76%.

Wass & Kahn neg. 11-2-37.

Urine—11-1-37; acid; 1021; occ.WBC.

Summary: Admitted October 29, 1937 for the emergency treatment of laceration of the scalp, sustained when he fell during an epileptic attack and struck his head on the pavement. Wounds were treated and are healing hapidly. Emergency treatment completed and patient has requested discharge.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Diagnosis:

1.	Wounds, recent, lacerated & contused, occipitoparietal region of scalp, left	3127—3131
2.	Psychosis, epileptic deterioration	1398
3.	Arthritis, chr. traum., dorsal & lumbar spine	3008
4.	Scars, healed, P.O. lower dorsal & upper lumbar regions	0285
5.	Fracture, old, healed, 12th dorsal & 1st & 5th lumbar vert.	0285
6.	with deformity & loss of bone structures.	0385—3082
	Ankylosis of 12th dorsal & 1st lumbar	0922—0106
7.	Scoliosis & kyphosis, lumbo-dorsal	0344—0346
8.	Limitation of motion, lumbar-dorsal spine	0106
9.	Scars, traum. mult. head & neck, old, healed	0285
10.	Conjunctivitis, chr.	0312
11.	Defiation nasal septum	0417
12.	Missing teeth	0023
13.	Hallux valgus, bilat., more marked right	0662
14.	Pes Planus, 2nd degree, bilat.	0587
15.	Hemorrhoids, external	0705

/s/ J. R. BROUN

M.D. Ward Surgeon

Defendant's Pre-Trial Exhibit No. 1—(Continued)
Approved and forwarded:

/s/ R. W. BRACE
M.D. Chief Medical Officer
Veterans Administration
Roseburg, Oregon
Admitted January 19, 1938

REPORT OF NEUROPSYCHIATRIC EXAMINATION (First Admission)

Name Mahoney, William V. SC-HOSP-WW C-430 162 Reg.#4915

Service, Rank and Organization: Pvt., Co 3, Serv. Bn. Army School.

Permanent Address 1728 S. W. Broadway, Portland, Oregon.

Religion Cath. Birthplace Flandreau, N. D. [207]

Date of Birth 4-11-96 Age 41

Sex M Race W Marital Status Married Occupation Bookkeeper.

Date of Enlistment July 13, 1917 Date of Discharge May 22, 1920.

Family History: (Information given by patient).

Father, Thomas, born in Ireland, died at 60, cause unknown; some surgical condition. Mother, Johanna McMahain, born in Minnesota, died at 65, cause unknown; Brother, Jack 47, living, well and married; Brother, Francis, 32, living, well and married; brother, James, 38, living, well and married.

Defendant's Pre-Trial Exhibit No. 1—(Continued)
Sister, Loretta, 45, living, well and married. Patient denies that any member of his family suffered from paralysis, seizures, insanity, nervousness, alcoholism, drug addiction or criminalism. States the home and family life has been always happy and that his father was a good provider.

Personal History:

Patient was born in South Dakota on April 11, 1896. He had measles as a child and mumps. Denies any illnesses or injuries in adult life save the present illness. Started school at 6 years, finished 8th grade, took a business course and then 2 years at University of Washington in commercial course as a trainee. Got along well in school. Enjoys drinking alcohol at times, but denies spree drinking. Never lost a job from drinking or received hospital treatment for it. Enjoys pool, billiards, golf, and baseball; likes to associate with his friends. Considers that he is easy to get along with. Does not hold grudges and is of a cheerful frame of mind. On May 20, 1930, not certain of the date, he married Clara Swenson. No children from this union. Considers the marriage as a happy and successful one.

Military History:

Enlisted July 13, 1917; was discharged May 22, 1920, Pvt., 3rd Co., Service Battalion, Army School. Got along in service with the officers and men. No AWOL or any general or summary court martial. Had flu in service and was treated at Field Hospital

Defendant's Pre-Trial Exhibit No. 1—(Continued)
#12. In France had his back broken (3 vertebra) as result of a pile of potatoes falling on him. Was treated with a laminectomy and was hospitalized in France, Grand Central Station, New York, Salt Lake City, Fort DesMoines, Iowa, and Fort Sheridan, Ill. for this condition, and discharged from service at Fort Sheridan, SCD.

Post-War History:

Industrial History:

Northern States Power Co., Minot, N. D., 1920 to 1923, Meter Reader, about $65. mo.

Business College, Portland, Oregon, 1923 to 1924, Vocational trainig.)

Univ. of Wash., Seattle, Washington,) Under
1924 to 1925, Vocational training.) Vets. Adm.

Olds, Wortman & King, Portland, Oregon, temporary from 1925 off and on, men's furnishing dept., $2.50 per day.

Previous hospitalization: St. Vincent's Hospital, Portland, Oregon, date unknown, seizures; Good Samaritan Hospital, Portland, Oregon, date unknown, seizures; Emergency Hospital, [208] Portland, Oregon, 2 or 3 times, date unknown, seizures; VAF, American Lake, Washington, 1930, 2 months, seizures; VAF, American Lake, Washington, 1933, 6 weeks or 2 months, seizures; VAF, Portland, Oregon, 2 or 3 seizures, one or tow days at a time; VAF, Roseburg, Oregon, 1-19-38.

Onset of present illness: About five years ago began having seizures. First one occurred at home.

Defendant's Pre-Trial Exhibit No. 1—(Continued)
Is not able to remember the circumstances under which the seizure occurred. Present complaints: The seizures he describes as falling unconscious and after a short period regaining partially his consciousness and then after a period of about 2 hours a full return of consciousness, together with a feeling of drowsiness and fatigue. States at times for two days he has a tired sensation in his legs and a loss of appetite, and just before a seizure will have a ringing in his ears. He has never suffered from incontinence or urine and feces. He does not bite his tongue. States the seizure may appear as many as 5 in a day and then may not have a seizure for 5 or 6 months. The last seizure occurred just prior to admission here. During that one he fell and broke his left clavicle, cut his head and discolored an eye.

Physical Examination:

Patient is a well developed and nourished white male weighing 151 pounds and 68½ inches tall. Hair, light brown with beginning baldness on the vertex. Eyes are blue. Several small scars on head. Recent scar left frontal region 1½ inches long, recent fracture left clavicle, deformity of lower left chest result of injury in service. Old P.O. scar from lower dorsal to lumbar region, the result of a laminectomy performed in service. Right great toe overrides first toe. The back appears to have its emotions intact. Part of the P.O. scar of the back is sensitive to touch. B.P. 120/90; pulse 84; temp.

Defendant's Pre-Trial Exhibit No. 1—(Continued)
98.8; resp. 16. Has no evidence of acute disease of the eyes, ears, nose or throat. Thryoid is not palpable, nor does it appear enlarged. There appears to be no disturbance in the lymphatic glands. The chest is symmetrical. Expansion good on both sides. There is no lagging. Lungs present no findings suggestive of disease. Heart sounds are clear. Heart does not appear to be enlarged. No murmurs. The rate is good. Abdomen is soft, flat and no findings to suggest the presence of pathology. Extremities are average in appearance ind examination.

X-ray Examination:

1-17-38—x-ray of left shoulder is normal, except the clavicle is deformed near the acromion.

Laboratory Examination:

Urinalysis is negative.

Neurological Examination:

Pupils react to light and accommodation. Extrinsic muscles of eyes are average. Tongue protrudes in midline, has its functions intact. The other cranial nerves appear to be average. The plantar and abdominal reflexes are absent in their response. The cremasterics are average. Left Achilles reflex is absent. The other deep reflexes are present and equal. There is no ataxia, no clonus, no disturbance in the Rhomberg position, no Babinskis, no atrophies or hypertrophies. [209]

Mental Examination: When the patient first entered this facility he was slightly confused and

Defendant's Pre-Trial Exhibit No. 1—(Continued)

had difficulty in finding his way about the ward. In the beginning he was slightly fault finding and exacting. After a few days he became more cooperative and pleasant and less confused. He will help at any O.T. ward assignment and does fairly well. He associates with the other patients. His letters have been pleasant and well constructed. There has been no depression or hyperactivity. Nor have there been any seizures. He has enjoyed the privilege of going on about the grounds unescorted. Orientation: Patient is well oriented for time, person, and place. General information: Is able to answer stock questions in an average manner. Has only a spattering knowledge of present day events. Mood: Are you happy or sad? "I feel happy, Doctor, as can be expected with our ups and downs." On the ward, the patient appears to be happy generally. He denies any hallucinations. Delusions: People treat him well. There have been no evidences of delusions. Recent Memory: Is able to give date of admission and to recall the articles of food that he has eaten in the past two days. Remote memory: Is poor. He has difficulty in remembering many dates and to place certain episodes in his life chronologically. Stream of talk: What would you like to do? "I would like to work. Something life office work, or store, work, but you know a fellow can't work with those seizures." His talk is coherent and relevant. He appears to have difficulty in calling up ideas at times. Attention is easily gained and held. Emo-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

tional flow: Patient is slow in emotional expression. There appears to be no disassociation of the emotions. Retention is average; forms simple calculations slowly but correctly. The more complex calculation, for instance the 7 from 100 test, he does with great difficulty, making 7 erros. He answers the stock questions of good judgment correctly, but his general judgment is poor. Has partial insight into his condition. Does not believe there has been any change in his thinking or his memory or his ability to grasp new ideas.

Summary: The family history is essentially negative. Personal history—the patient had usual diseases of childhood and appears to have been in good health until he was injured in service, receiving a broken back, was treated by a laminectomy. He was discharged SCD. Believes he enjoyed fair health until 5 years ago when he began having periods of unconsciousness. Physical examination is essentially negative as are the neurological and laboratory examinations. At this time the patient complains only of seizures. Mentally, the patient shows difficulty with recent memory, has slowed up, has periods of confusion; stream of talk is coherent and relevant. Frequently some time is required before he can express an idea. No evidence of hallucinations or delusions. At times becomes irritable, fault finding and exacting. Shows difficulty in 7 from 100 test. Has little idea of current events. His emotional response is slow, but there is no disassociation of emotions or flatten-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

ing. Judgment is poor. Has partial insight into his condition.

Staff Note: The patient was presented and during the examination he gave a fairly clear account of his epileptic seizures coming on without any warning, falling on several occasions and injuring himself [210] severely, more recently to the extent of fracturing the clavicle. He presents a marked irritable conversation following one of these epiletic seizures; he is insulting to others, but is more inclined to injure himself. The staff agreed upon the following diagnoses:

1398 Psychosis, epileptic, deterioration
0139 Arthritis, chr. traumatic, dorsal & lumbar spine
0593 Fracture, lumbar vert. 1,5,12 dorsal, healed w/fusion and ankylosis
0285 Cicagrix, P.O., spine

Remarks: This patient is considered by the members of this staff to be mentally incompetent and in need of continued hospitalization. His disability is considered to be permanent and total due to the nature and duration of same.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

Date Staffed: February 18, 1938
Presented by:
/s/ KENNETH W. KINNEY,
KENNETH W. KINNEY, M. D.
/s/ A. H. MOUNTFORD
A. H. MOUNTFORD, M. D.
Chairman
/s/ G. O. IRELAND
G. O. IRELAND, M. D.
Member
/s/ E. PETERSON
E. PETERSON, M. D.
Secretary

Typed 7-20-39 mjb

REPORT OF PHYSICAL EXAMINATION ON TSFR. TO ROSEBURG, OREGON

Date of admission: July 17, 1939

Date of transfer: July 20, 1939 C-430 162

Mahoney, William Vincent 1728 SW Broadway, Portland, Oregon.

Pvt. 3rd Co. Serv. Bat. Birthplace—Flandreau, S.Dak. April 11, 1896.

Personal History: Broken back, Nov. 11, 1918; Spileptic spells since about 1930; Repair of lacerations of scalp, Oct. 29, 1937;

Complaint on Admission: Patient was hospitalized at this facility last year at which time a diagnosis of psychosis, epileptic with deterioration, was made. Patient has frequently injured himself severely during his epileptic convulsions. Patient

Defendant's Pre-Trial Exhibit No. 1—(Continued) brought to hospital in a somewhat confused state with a history of having had an epileptic seizure during which he injured the right side of his face. He had been informed that his jaw was probably broken, and enters hospital for treatment of this condition. [211]

N.P. Exam. by Dr. F. J. Ernest—July 19, 1939: This patient was brought to hospital 9:00 AM July 17, 1939 badly bruised, left eye black, jaw fractured (left lower). Not conscious. Since entrance he has had seizures. Fairly clear between attacks. Has had no seizures for past 24 hours. This morning he is clear enough to explain about being in emergency hospital, allowed to leave at 6 AM July 17, 1939. He got as far as old postoffice and when next he knew he was back in emergency hospital. This is a deteriorated epileptic requiring care and treatment under N.P. supervision. He is now on trial visit since July 9, 1939. Diagnosis: 1398 Psychosis, epileptic, deterioration—Incompetent requiring guardianship. Recommend his return to Roseburg, V.A. Facility. While at this hospital he will require special supervision and enough luminol to control seizures. During the day he may get by under ward supervision. Treatment at night—a safety belt should be applied and he should have a low bed.

XRay Left Face—Dr. Minehart—July 18, 1939:

The left lower jaw is deformed at the angle. The appearance suggests recent, ununited fracture. The lower fragment is displaced downwards 8 mms.

Defendant's Pre-Trial Exhibit No. 1—(Continued)
A large molar is seen lying in the plane of fracture. On the other side impacted teeth are seen in the lower jaw. These films are poor because the patient was psychotic and therefore uncooperative.

7-17-39: WBC 6600; polys. 66-1 stab; lymp. 28; mono. 5; hb 88%; Wass & Kahn neg.

7-17-39: Urine, acid—1018; album & sug. neg; mucus 2 pl; WBC 1 pl; occ. sq. & rd cell epith.

Copy of Gen. Phys. Exam. Made on Admission Attached.

July 19, 1939

General Appearance: Well developed and well nourished ambulant white male.

Height: 68½ inches Average Weight: 141 pounds Present Weight:

Blood Pressure: S—118, D—88.

Head: Tenderness, swelling, and crepitation, at angle left mandible.

Eent: Pupils regular, equal, react to light. Hearing grossly normal. Ecchymosis about left eye subconjunctival hemorrhage. Deviated nasal septum.

Neck: No adenopathy. Thyroid gland not palpable.

Mouth: Teeth, many missing. Patient unable to open jaw very wide because of pain.

Chest & Lungs: Expansion good & equal. No rales. Normal vesicular breath sounds. Resonance normal throughout.

Heart: Normal position and size. PMI 5th interspace MCL. Sounds distant and metallic. No

Defendant's Pre-Trial Exhibit No. 1—(Continued)

murmurs, thrills, or arrhythmis. Peripheral arteries are not sclerotic.

Abdomen: Normal contour. No masses, tenderness, or rigidity. Kidneys, liver, and spleen not palpable. No scars.

GU: No varicocele, hydrocele, or hernia.

NP: See special report.

Joints: Moderate scoliosis and kyphosis of lower thoracic spine, with healed PO scar over lower thoracic vertebra.

Extremities: Bilateral Hallux Valgus; Weak feet, 2nd degree, bilat.

Anus: External hemorrhoids.

Skin: Contusions on hips, knees and trunk.

Note Dr. Ernest's recommendations.

Diagnosis:

1. Psychosis, epileptic deterioration..... 1398
2. Nephritis, parenchymatous, chr., history 1063

[212]

3. Fracture of mandible..... 3082
4. Ecchymosis, left lid..... 0465
5. Subconjunctival hemorrhade, left..... 0699
6. Arthritis, chr., traumatic, old, dorsal & lumbar spine 3008
7. Scars, healed, PO, dorsal & lumbar spine 0285
8. Fracture, old, healed, 12th dorsal and 1st and 5th lumbar vertebrae..... 3072

Defendant's Pre-Trial Exhibit No. 1—(Continued)

9. Ankylosis, 12th dorsal & 1st lumbar vertebrae 0106
10. Scoliosis & kyphosis, lumbo-dorsal spine 0346
11. External hemorrhoids 0705
12. Deviated nasal septum..... 0417
13. Hallux valgus 0662
14. Weak feet 0587
15. Missing teeth 0023

H. ROSOW, M. D.

Mahoney, William V NSC WW 430 162 28616

Findings by Dentist—Compound fracture of left mandible in region of lower left third molar. The third molar is very loose and attached only by mucous membrane and irritates the patient. Treatment: The treatment of this fracture will require inter-maxillary wiring for a period of six weeks and possibly it will be necessary to place a vitallium screw in the ramus with traction to a skull cap.

Summary: This patient was admitted to this hospital with a fractured jaw, which he sustained during an epileptic seizure. Patient has marked mental deterioration, and is being transferred to Roseburg at the recommendation of the NP Consultant.

Diagnosis: Same as directly above.

/s/ H. ROSOW

H. ROSOW, M.D. Ward Surgeon

Defendant's Pre-Trial Exhibit No. 1—(Continued)
Approved and forwarded:

/s/ R. W. BRACE
R. W. BRACE, M.D. Chief Medical Officer

Veterans Administration
Roseburg Oregon

DISCHARGE SUMMARY

Name: Mahoney, William V. C-430,162 Hospital Reg.#: 4915.

Date Admitted: January 19, 1938.

Permanent address: 1728 S. W. Broadway, Portland, Oregon.

Nearest relative: Wife, above address.

Military History: Enl. July 13, 1917 Disch. May 22, 1920 Pvt. Co. 3, Serv. Bn. Army School.

[213]

This patient was admitted January 19, 1938. At the time of admission, he was transferred to the infirmary ward for treatment of fracture of the clavicle, which eh had received during an epileptic seizure prior to admission. Improvement was satisfactory and he made a fairly satisfactory hospital adjustment. February 23, 1938, he attempted to elope. Following this, he improved, denied elopement ideas and on March 22, 1938, was granted parole. April 2, 1938, did not return from a town pass. April 28, 1938, returned unaccompanied and parole was restored July 2, 1938. July 16, 1938, again eloped but was apprehended and returned to the hospital. Following this was rather unco-

Defendant's Pre-Trial Exhibit No. 1—(Continued)

operative and irritable. August 22, 1938, developed a phimosis and a dorsal split of the penis was made by the Consultant Surgeon. He also developed skin lesions, and was placed in isolation. On October 21, 1938, his blood Wassermann was four plus. October 19, 1938 Wassermann and Kahn: Positive, four plus. January 18, 1939: Wassermann negative, Kahn four plus. May 10, 1939: Wassermann negative, Kahn 3 plus.

Anti-luetic treatment was started. Patient reacted to neosalvarsan, and for this reason treatments were limited to tryparsamide and thiobiamol. On April 9, 1939, again on parole and eloped June 10, 1939. Placed on leave of absence status until July 10, 1939. Status changed to trial visit on July 21, 1939. He returned unaccompanied, complaining of pain of his mandible. X-ray revealed a fracture of the right mandible.

X-ray Report July 21, 1939: Examination of the facial bones and both mandibles shows a fracture of the left zygomatic arch at the anterior end and mid-portion without separation or displacement. There is a semi-oblique fracture of the right mandible extending from the region of the third molar backward to the angle of the jaw. The anterior fragment shows slight downward and outward displacement. Reexamination after a wire splint had been applied to the teeth shows the jaws to be worse. The anterior fragment is displaced downward approximately one-fourth inch and inward the same distance with slight over-riding.

Defendant's Pre-Trial Exhibit No. 1—(Continued)

X-ray Report August 7, 1939: Examination of the mandible shows the fracture at the angle of the left mandible to be in good position and apposition. The fractured edges are not as clear cut and distinct and show evidence of beginning union.

X-ray Report August 24, 1939: Reexamination of the left mandible shows the anterior fragment displaced downward and backward approximately ½ cm. There is evidence of union but so far there is very little bone callus.

X-ray Report September 13, 1939: Reexamination of the right mandible shows no change in position. The anterior fragment is displaced downward approximately one-half cm. The lower half of the fragments appear to be in good contact but there is slight separation in the upper portion due to a slight inward displacement of the anterior fragment and a slight inward rotation of the upper portion of the distal fragment. There is some periostitis reaction along the lower border of both fragments, extending for a distance of three-fourths inch on either side of the line of fracture. The line of fracture is not as apparent as previously seen and there appears to be fairly good bone union in the lower half.

X-ray Report October 27, 1939: Reexamination shows no change in the position of the fragments. There appears to be good union at the lower end of the line of fracture. There is still slight separation and lack of union in the upper half inch, although this appears to be filling in. [214]

Defendant's Pre-Trial Exhibit No. 1—(Continued)

X-ray Report February 7, 1940: Reexamination of the left mandible shows no change in the position of the bone. The edges of the fracture are smooth and rounded. There appears to be union in the middle portion but the upper third of the line of fracture does not show any evidence of bone union.

Union of this fracture was rather unsatisfactory, as shown by a review of the various x-ray examination. The patient made a fairly satisfactory adjustment and was returned to the parole ward. June 27, 1940 again eloped. Elopement status was changed to leave of absence on July 2, 1940. August 1, 1940, changed to trial visit status and discharged August 1, 1941, at expiration of trial visit.

During this hospitalization received phenobarbital regularly in treatment of epilepsy. Also received 17 three gm. and 1 one and a half gm. doses of tryparsamide intravenously and 21 2/10 gm. thiobiamol instramuscularly.

Diagnoses:

1. 1398 Psychosis epileptic deterioration treated, unimproved
2. 0139 Arthritis, chr. traumatic, dorsal and lumbar spine untreated, unimproved
3. 3082 Fracture, lumbar vertebrae, 1, 5, 12, dorsal healed, with fusion and ankylosis
4. 0285 Cicatrix, P.O. spine untreated, unimproved.
5. 1644 Syphilis, tertiary treated, improved

Defendant's Pre-Trial Exhibit No. 1—(Continued)

6. 3082 Fracture, right mandible treated, improved
7. 0023 Missing teeth untreated, unimproved
8. 0630 Gingivitis, far advanced treated, improved

/s/ CLARENCE E. JUMP
CLARENCE E. JUMP M.D.
/s/ KENNETH W. KINNEY
KENNETH W. KINNEY M.D.
/s/ M. L. UNDERWOOD
M. L. UNDERWOOD M.D.

Approved:

/s/ W. E. FUTRELLE
W. E. FUTRELLE M.D.
Chief Medical Officer [215]

Mr. Meindl: We now call Dr. Evans.

JOHN C. EVANS

was thereupon produced as a witness in behalf of the plaintiff herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Meindl:

Q. Would you state your name, please, Doctor?
A. John C. Evans.
Q. And where do you live, Doctor?
A. At the State Hospital at Salem.
Q. And what is your profession?

(Testimony of John C. Evans.)

A. Practicing medicine.

Q. Are you licensed to practice medicine in the State of Oregon, Doctor? A. I am.

Q. And how long have you been so licensed?

A. Thirty-six years.

Q. From what school or schools are you a graduate? A. University of Oregon.

Q. Medical School, Doctor?

A. That is right.

Q. And when were you graduated?

A. 1906.

Q. And you have specialized in any branch of your profession?

A. Psychiatric—mental and nervous diseases.

Q. And how long have you so specialized?

A. Over thirty-six years.

Q. Are you connected with any institution at the present time, Doctor? A. Yes.

Q. Which one?

A. The Oregon State Hospital at Salem.

Q. And in what capacity, Doctor?

A. Superintendent. [216]

Q. How long have you been the superintendent of the Oregon State Hospital at Salem?

A. Since July 1, 1937.

Q. You succeeded Dr. Steiner then?

A. That is right.

Q. And how long have you been connected with the Oregon State Hospital?

A. Since April 15, 1906.

(Testimony of John C. Evans.)

Mr. Meindl: May I have Pre-trial Exhibit No. 10?

Q. Doctor, have you ever had the occasion to examine William V. Mahoney, the insured in this case, sitting here at the counsel table?

A. Yes.

Q. Doctor, I will hand to you Pre-Trial Exhibit No. 10 and ask you what this record is.

A. This is the State Hospital record of William Mahoney.

Q. Is that the insured in this case, Doctor?

A. How is that?

Q. Is that the veteran sitting here at the counsel table?

A. I beg your pardon; I have a cold in my head and my hearing is very bad today.

Q. Is that the record of William V. Mahoney sitting here, Doctor? A. Yes.

Q. When did you examine him?

A. I examined him on March 10, 1934.

Q. What did you find his condition to be at the time you examined him?

Mr. Dillon: I object, your Honor, unless it be shown that he is testifying from memory—refreshing his memory or testifying as to his recollection, independent of the records.

The Court: Yes, I think you should ask him what he was doing.

Q. (By Mr. Meindl) Doctor, do you need these records in order [217] to tell what his condition was at the time you examined him?

(Testimony of John C. Evans.)

A. Yes, the record indicates that his mental diagnosis was that of epileptic deterioration.

Mr. Dillon: I object, your Honor, as not a direct answer to the question.

The Court: That is true, he did not answer directly, but this is direct examination.

Mr. Dillon: If he wants to refresh himself, that is what I want to know, your Honor.

The Court: Well, I take it he is refreshing his memory.

Q. (By Mr. Meindl): You are refreshing your memory by looking at your own records? Is that correct, Doctor?

A. That is right. I wanted to be sure.

Q. What was your finding at the time you examined him in March of 1934?

A. That is right, March 10, 1934.

Q. And what was the matter with Mr. Mahoney at that time?

A. I thought he was suffering from epilepsy with deterioration.

Q. What was your diagnosis, Doctor?

A. That was it, epileptic deterioration.

Q. What do you mean by epileptic deterioration?

A. Well, epilepsy is a disease of the central nervous system characterized by particularly what is commonly known as fits or convulsions, and the first time I saw him, which led to my suspicion that he might be suffering from epilepsy, his tongue

(Testimony of John C. Evans.)

was badly bitten, which oftentimes takes place during a seizure, and that, along with the history that he supplied me, gave me the opinion upon which I based my diagnosis, which later on proved to be true.

Q. What was that history, Doctor?

A. Shall I read it?

Q. Yes.

A. "Age 37, married. Occupation, bookkeeper. Residence, Port- [218] land. Physical health fairly good. His tongue is bitten on both sides and anteriorly. Patient states that he suffered a dislocated and broken back while in France during the Armistice. Claims that this injury gives him no trouble at the present moment. However, he is drawing compensation at the rate of $45 per month. Commitment claims he drinks moderately and is suicidal. Recently tried to jump off the bridge into the river, particularly to avoid someone whom he thought was after him. Has delusions of persecution. Imagines someone is trying to kill him. Delusions changeable. Hallucinations of hearing and sight, is restless and depressed. There is a question of epilepsy in his case. This morning patient exhibited a badly bitten tongue and gave the history that recently he thought a certain policeman was framing him, put up a gag upon him and got his name mixed into it and took a very serious dislike to him. Says there was no reason for this, but the policeman attacked him upon the bridge and was going to throw him into the river. In fact,

(Testimony of John C. Evans.)

when the bitten tongue was discovered, epilepsy was at once suspected and the patient admits that he had his first spell about ten years ago and has had many convulsions since that time, that he has them about once a month and sometimes he will have two or three spells in short order. In fact, he was somewhat dazed and it was impossible for him to give a dependable history this morning", and my diagnosis at that time was epileptic deterioration.

Q. Doctor, would you define epileptic deterioration, what that means?

A. Yes, it is, as I started to describe it a bit ago, a disease affecting the central nervous system, and the outstanding symptom or manifestation of that disease is the typical convulsion, and along with that these patients undergo a change of character, they are different than they formerly were, [219] they are more or less irritable and hard to get along with ordinarily. It depends upon the severity of the disease. There are severe cases and mild cases, and in the severe cases they become more or less impaired in mind to the degree they are unable to put out the brain work they formerly did; in other words they become impaired in various manners. I believe that is a short boiled-down description of epileptic deterioration.

Q. Was Mr. Mahoney sane or insane at the time of your examination?

A. I would consider that he was insane, mentally sick.

(Testimony of John C. Evans.)

Q. Doctor, with regard to the convulsions, what happens at a convulsion? Is it a falling? Could you explain a convulsion in an epileptic case?

A. Well, the typical convulsion is characterized by—perhaps the patient himself will have a premonition that they don't feel right, they may have some sensation, and suddenly they may utter a cry and if they are standing they will fall. It is a complete and sudden loss of consciousness. They are rigid and hold their breath until sometimes they become black in the face, you might call it. That lasts from perhaps a half to a minute, and then they start in with clonic, jerking movements of the arms and legs and stertorous breathing, and they may pass urine involuntarily during that time, and finally the clonic convulsion ceases and they are relaxed, and eventually they will rouse themselves, but they are stupid, confused, and they are not too clear in mind, and that period is anywheres from a few minutes to maybe an hour or so. The ordinary case clears up mentally to where they can get around and know what it is all about in from fifteen to thirty minutes. Sometimes they will have a convulsion and come out of it and never have knowledge at all of ever having had one. That is the typical epileptic seizure. [220]

Q. Is there a seizure where a person does not fall and does not appear in that state that you have described, Doctor?

A. Yes, we have a type of epilepsy known as a psychic. They have all of the symptoms of epi-

(Testimony of John C. Evans.)

lepsy devoid of the convulsion itself. What I mean is, they don't fall down and convulse, but they may be out momentarily. They will be unconscious. For instance, as an example, a fellow suffering from a mild form may be sitting at a table eating, suddenly he will cease his conversation or cease feeding himself for a few seconds and then start to feed himself and take up the conversation where he left off. That is a very mild type of what we call petit mal or mild epilepsy, not as severe as the common epilepsy that everybody knows about.

Q. Doctor, assume that an individual entered the United States Army on July 15, 1917 and while in the Army was hospitalized for seventeen days in February of 1918, also hospitalized in March of 1918, and then on November 11, 1918 was hit on the head by three sacks of potatoes in France, resulting in a crushing fracture of the twelfth dorsal and first and second lumbar vertebrae, that that individual was put in a camp hospital in France and remained there until December 31, 1918, when he was transferred to a hospital center in France where he remained until April 1, 1919, from there transferred to Base Hospital No. 69 in France where he remained until May 14, 1919 and was then transferred to the embarcation hospital in New York, where he remained until May 25, 1919 and then was transferred to the United States Army General Hospital, Fort Des Moines, Iowa, where he remained until August 20, 1919, and then was transferred to the U. S. Army General Hospital at

(Testimony of John C. Evans.)

Fort Sheridan, where he remained until his discharge from the Army on May 22, 1920, but that in January of 1920 he was out of the hospital on a furlough for a few weeks, and assume further, Doctor, that this individual appeared normal mentally and [221] physically, worked prior to going into the Army at hard labor mixing mortar, and so forth, but upon his return and being discharged from the Army the following things were noticed about this individual, that he imagined everybody was—or strike that; that these things were noticed at the time of his furlough in January of 1920, that he imagined everybody was bothering him, that somebody was after him, his conversation was rambling, he would talk about one subject and switch over to something else, could not make head or tail of his conversation, he would sit and stare, didn't seem to want to talk to anyone, had a vacant stare, felt people were against him, he was very nervous, that a year following his discharge he was awfully nervous, not the same as he was before his service, he was in a changed manner, he acted funny and nervous, he was irritable to the point of being unpleasant, his conversation was rambling, he would talk about one subject and change to another, he kept to himself and was suspicious of people. Assume further, Doctor, that this individual was employed at a power company reading meters part of the month and office boy the other part, but he was known at this employment by the nickname of "Dizzy", you would go and look for him and find

(Testimony of John C. Evans.)

him in some out of the way place amusing himself by either looking out the window or playing with some small object in his hand such as an eraser, that he was peculiar, that he didn't associate with his fellow employees and would sit with a blank expression on his face, he was a loner, you would find him staring out of the window or staring into space, he would take prejudice against certain people and other employees, that he was hired and kept because of sympathy and employed by an individual who was active in the American Legion. Assume further Doctor, that the main symptoms that were mentioned in this hypothetical question following his discharge and at the time of his furlough were noticed in the [222] years on through, not particularly any apparent change, would you have an opinion as to whether or not this man's mind was unsettled as of the time of his discharge from the Army? I should also ask, Doctor, take into consideration that this individual was in the same condition in 1934 as you found William V. Mahoney to be at the time you examined him. Would you have an opinion as to what if anything this man was suffering from at the time of his discharge from the Army in 1920?

Mr. Dillon: I object to the question, your Honor, first for the reason that the history of hospitalization given is simply a series of dates and not any information as to the diseases from which he was suffering during that period; second, on the grounds that facts have been included that are not accu-

(Testimony of John C. Evans.)

rate, for instance, that he was irritable to the state of being unpleasant when the testimony is to the contrary; the witness said, "no, not unpleasant"; also on the grounds that there is no testimony to the fact that symptoms narrated as at the time of discharge and the year after continued excessively throughout to the year 1934, but on the other hand, as I recall it, the only evidence is '24, '27, and '33, also on the ground that the question is wrong in embodying alleged facts that are supposed to have been narrated in keeping with the facts narrated from history only in Dr. Evans' examination of 1934.

The Court: The objection is overruled. There is no proper objection to a question asked hypothetically that there are certain elements of it that mean nothing. The mere fact that no data is given regarding hospitalization might or might not mean anything. If the witness thinks that that factor has not probative value he can given it no weight in the opinion. If he thinks it has value he probably will. The further factors that are mentioned are not proper objections to this type of a question because the examiner can ask the Doctor any ques- [233] tion he wants to. You can argue to the jury that it is improperly founded and there is no evidence to base it on, but he can ask any kind of a hypothetical question. He is not bound to put in the things that are in evidence or not in evidence. You can develop subsequently by your cross-exami-

(Testimony of John C. Evans.)

nation or in your argument that there is no such factor as the basis of the hypothetical question. The only thing that the Court is responsible for is that the hypothetical question in general is fair, and I think this one is fair. You may answer.

Q. (By Mr. Meindl): Would you like to have the last part of the question, Doctor?

A. Am I to answer the question you propounded?

Q. Yes.

A. Assuming that all those statements are matters of fact it would be my opinion that certainly there was something radically wrong with Mahoney's mind; there would have to be in my opinion.

Q. Well, Doctor, assuming these facts to be all true and assume further from what you found in 1934, this accident happening November 11, 1918, but giving your opinion as of May 22, 1920, eighteen months later at the time he was discharged, was he in your opinion sane or insane at the time he was discharged in May of 1920?

A. That is most difficult for me to answer and be positive. My personal opinion of Mahoney's case is that his entire trouble was an end result of the head injury or injury to the central nervous system he received on November 11, 1918. I would put it this way, that had that injury not occurred he would not have had his epilepsy, and I don't believe that any man is wise enough to say that even adopting the accident that took place, accepting that as a matter of fact, I don't believe anyone is wise

(Testimony of John C. Evans.)

enough to say just when the mental involvement did actually start. I am not wise enough to say that yes- [224] terday the man was well but today he is mentally sick, but believing his entire trouble was due to the injury as just related I am inclined to believe that——

Mr. Dillon (Interrupting): We object, your Honor, to any inclination the Doctor has.

The Court: Overruled. He is testifying as an expert. He can give his opinion.

Mr. Dillon: May he give his inclination also, your Honor?

The Court: Yes, that is an opinion.

A. (Continuing): I was trying to put over this fact as I see it. Based upon my years of experience with head injuries and epilepsy it is my opinion that his impaired state of mind must have started perhaps within a few months following this head injury. That has been my experience, but I can't say whether it was the first two weeks or the first two months or a year, but I believe it was during that period. My experience leads me to that conclusion.

Q. (By Mr. Meindl): Well, Doctor, the discharge from the Army was in May of 1920 and the injury was November 11, 1918, and assuming further the changes in personality, would you have an opinion as to what the condition was in May of 1920, eighteen months after the injury?

A. That is most difficult to formulate an opinion upon a question of that sort. After all, it is an opinion.

(Testimony of John C. Evans.)

Q. Well, your best opinion, Doctor.

A. I am basing my opinion upon my experience in head injuries and it is reasonable in my mind to assume that his mental symptoms certainly must have started prior to 1920. I may be mistaken on that. That is simply an opinion.

Q. Doctor, assuming these facts again, then what is your best opinion as to whether or not this individual was sane or insane on May 22, 1920 at the time he was discharged from the Army? [225]

A. Again that is most difficult. You know, there is a difference between being deteriorated in mind and having a psychosis or being insane. What I mean by that is this, that a person can be deteriorated and not having a psychosis, and yet they can be deteriorated and have a psychosis. To clarify that further, I might cite you the case of an old man that is suffering from senile dementia. That is an organic condition due to the wear and tear on the brain cells. He becomes forgetful and he also undergoes a change of character. He does things that he didn't formerly do ten or twenty years ago, but he does not suffer from a psychosis. So in the case of William Mahoney. On May 22, 1920 he might have had some deterioration and at the same time not be frankly insane or frankly psychotic. It is impossible for me to say.

Q. Doctor, assuming that same state of facts again, how many years prior to your examination in 1934 would you give an opinion as to his insanity?

(Testimony of John C. Evans.)

I believe you testified he was insane at the time of your examination.

A. I believe he was deteriorated for some considerable period prior to the time I examined him, but whether or not he was frankly insane back in 1920 or along about that time I can't say for sure. I don't know; but I do believe he was deteriorated. I think his brain was injured, that is the idea, and that fine distinction—I might add this, that if one had to choose between being frankly psychotic or to be deteriorated in mind the deterioration is much more harmful and much more permanent in character probably than some of the functional conditions known as being psychotic or insane.

Q. Is that a mental illness, being deteriorated?

A. Yes, it is a type of mental illness, but it is not psychotic. That is a functional thing. Some cases that are psychotic are curable, but when they are deteriorated they never get well. That is the point that I was bringing out, and I can't say just the date—I am not wise enough to know just when this [226] man was frankly psychotic. I can't say.

Q. Doctor, could you give an opinion as to five or ten years before the date of your examination as to that?

Mr. McGan: I object to that, your Honor, as repetitious. The Doctor has testified that he cannot give an opinion when this happened.

The Court: The objection is sustained.

Q. (By Mr. Meindl): Doctor, could you give

(Testimony of John C. Evans.)

an opinion as to about how long after this injury on November 11, 1918 this assumed individual did become mentally sick?

Mr. McGan: The same objection, your Honor.

The Court: I think the Doctor has answered that.

Mr. Meindl: Your Honor, may I be heard on that, your Honor? If your Honor please, the question has been confined to the date of May 22, 1920.

Mr. Dillon: Your Honor, he specifically asked with regard to 1931 too.

Mr. Meindl: Your Honor, I didn't.

The Court: I think the question has been answered, but you may ask it again, however.

Q. (By Mr. Meindl): Doctor, will you give us your best opinion as to how soon after this injury, assuming this same state of facts and also taking into consideration your own findings in 1934—how soon after this injury in 1918, how many years—your best opinion—did this man become insane? We are just asking your best opinion on that, Doctor.

A. It is almost impossible to approximate the date. I would say the best evidence and the surest or best answer to that would be answered by people who knew this man, who associated with him and saw these changes of personality. I think that would be much more valuable than the opinion of any so-called expert.

The Court: The answer is stricken. [227]

Q. (By Mr. Meindl): Doctor, assuming a change of personality were noted in January of

(Testimony of John C. Evans.)

1920 and also at the time of discharge in the summer of 1920, then would you have an opinion as to when the insanity arose?

Mr. McGan: I object to that, your Honor, as repetitious.

The Court: I understand the Doctor is saying that he has no opinion.

Q. (By Mr. Meindl): Doctor, did you hear these depositions read this afternoon?

A. I did, but I couldn't understand all of them; your voices were so low that I missed out on quite a lot of it.

Q. Doctor, would you have an opinion as to whether or not the assumed individual was insane in the year 1925, seven years after the injury?

Mr. McGan: If the Court please, I object to that as repetitious.

The Court: No, he may answer this one. I will find out about it. He may answer.

A. In answering that question I would have to assume the hypothetical question was true, those facts as you recited them and my examination of him in 1934, and I say it is my opinion that he was impaired in mind at that time, but whether he was frankly psychotic or not I can't say. I think he was deteriorated at that time, yes, but there is that distinction between a functional thing and permanent deterioration. I contend that he was deteriorated from an early date, but whether he was frankly psychotic in 1925 would be a wild guess on my part. I don't know.

(Testimony of John C. Evans.)

Q. (By Mr. Meindl): Well, Doctor, assume at a later date, the year 1930, which would be twelve years after the injury and just four years prior to your examination. Would you have an opinion on that date?

Mr. McGan: The same objection, and the further objection, [228] your Honor, that this invades the province of the jury.

The Court: No, he may answer if he has an opinion.

A. Again I will have to answer this last question the same as I did the one prior. I don't know.

Q. (By Mr. Meindl): Doctor, assume that the individual appeared the same and acted the same back in 1920 as he does at the present time, then would you have an opinion?

A. I would say that the changing personality, that he was a different man than he was formerly, leads me to conclude that for several years prior to the time that I examined him he was deteriorated and impaired in mind, but I am not wise enough to say when he had these delusions of persecution—when those things started in I don't know, and if you would ask me the question as to whether or not I *though* he was insane in 1933, again I don't know. It is a matter of opinion, and if I answered it I would have to guess. I am basing my answers on my experience in head injury cases. I am contending all along the man was injured mentally, that some damage certainly was done him, or he

(Testimony of John C. Evans.)

would not have developed this condition from which he still suffers, but whether he was frankly insane or not in those earlier years I just can't say.

Q. Doctor, you understand in answering a question you assume all these things as being true, do you not, Doctor, and give your opinion based upon that?

A. Well, I am saying that assuming these things were all true he certainly was impaired in mind and the mental damage was done him and that he was deteriorated, but whether he was frankly psycotic or not—I can't tell you the beginning of that. I don't know.

Q. Did you have occasion to see Mr. Mahoney today, Doctor? A. Yes, I did.

Q. Do you have an opinion as to whether or not his condition is permanent? [229]

Mr. Dillon: I object to that, your Honor, as not determining any question in the case.

Mr. Meindl: I will reframe the question—whether or not there is any hope for cure.

Mr. Dillon: That is practically stating the definition of permanent, your Honor.

The Court: He may answer.

A. Reviewing his past history and the injury and the condition that I found Mahoney in in 1934 and the condition I saw him in this afternoon I would say that there is no chance of cure. I think his trouble is permanent.

Mr. Meindl: You may cross-examine.

(Testimony of John C. Evans.)

Cross-Examination

By Mr. Dillon:

Q. Doctor, as I understand this is the first time you examined Mr. Mahoney since 1934?

A. That is right. This is the first time I have seen him since that time.

Q. And you made a preliminary diagnosis on March 10, 1934, did you not?

A. I believe that was the date.

Q. And is there not a later one in these files? Has that been called to your attention?

A. There may be. I believe I did a special examination for the Veterans Bureau, and if I recall it was the same diagnosis, practically.

Q. On March 10 you stated, as I see here, that the history given at that time was not dependable. What was the tentative diagnosis made then based on?

A. It was based necessarily on what I found, his bitten tongue and what he told me himself and what was contained in the commitment papers of the examining physician who had him [230] examined at the time of commitment. I based my opinion upon that.

Q. Did you not also base your opinion, as the records indicate, mainly on the history given to you by the wife of Mr. Mahoney?

A. I don't recall that.

Q. But you would have had before you, would not you, that portion of his exhibit signed by Mrs.

(Testimony of John C. Evans.)

Mahoney in which the history is set out in great detail?

A. Naturally we would consider that.

Q. Do you recall, Doctor, whether this condition improved or not while he was under your care and treatment? Did you not hear my question, Doctor? A. I did not.

Q. I beg your pardon. I will try to speak louder. Did Mr. Mahoney's condition materially improve while under your treatment and care?

A. Yes, he grew better.

Q. Doctor, taking up the question of epilepsy, is it not true that some of the leading and most intelligent citizens of the United States are unfortunately afflicted with epilepsy?

A. That is true, but not traumatic epilepsy.

Q. Is it not true, Doctor, that traumatic epilepsy begins within a comparatively short time after the trauma by the blow?

A. No, just the opposite is true. I have had a lot of experience with State Industrial Accident people, and in the old days when I was making their examinations they would close a head injury case against my judgment, and in two or three years following the injury they would have convulsions. That has been my experience.

Q. Is that the general accepted theory of medicine on that subject?

Mr. Bynon: That is objected to, your Honor, as improper [231] examination.

The Court: He is testifying as an expert and

(Testimony of John C. Evans.)

counsel has a right to ask him a question of that sort.

A. Of course doctors differ in their opinion somewhat, but I was basing my answer upon my own personal experience.

Q. Doctor, I notice in your last report—I am asking you if you remember it—that the patient completely cleared up mentally, is able to cooperate very well, is up and about, doing some chores about the hospital premises and is improving both mentally and physically. A. Yes.

Q. Doctor, is it not a fact that even when a person has epilepsy it does not follow necessarily that the brain is affected to a great degree?

A. It all depends on the case, of course.

Q. If a man, Doctor, has epileptic convulsions or seizures of not an extended period of time and they occur only three or four times a year his brain and mental functions would only be affected, would they not, during that short period while he was in the convulsions and the period following for some little time until he came out of it?

A. Again I must say it depends on the case. In the case of the man in question, and realizing that it is due to a head injury, that is, traumatic epilepsy, these convulsions are a sort of a symptom of the underlying condition, which may be very, very infrequent but does not particularly lessen the severity of his real trouble. However, as you have put it, a man who has more frequency and

(Testimony of John C. Evans.)

more severe convulsions is apt to become more deteriorated than a fellow who has them very infrequently; that is very true.

Q. Did Mr. Mahoney in 1934 while at Salem have any epileptic seizure?

A. Not to my knowledge. [232]

Q. Doctor, I understand you to say that from the symptoms narrated to you in the hypothetical question presented to you that there was mental deterioration ever since the accident Mr. Mahoney experienced. Would you be kind enough to tell me what symptoms were narrated to form a basis for that opinion?

A. I believe you misunderstood me. I did not wish to convey the idea that he was deteriorated right from the start, but the deterioration was an end result of his change of character, and so forth, that was read to me in the hypothetical question.

Q. Doctor, wouldn't those things narrated in the hypothetical question be more naturally attributed to the physical suffering that Mr. Mahoney had undergone?

A. That might aggravate his change of character, that is true.

Q. One suffering as he must have been with his injury, it would not be abnormal for a man to be irritable, would it?

A. No, that is true, but all of the symptoms enumerated in the hypothetical question put to me indicate brain damage as an end result of that

(Testimony of John C. Evans.)

injury. You can't just point out irritability as one symptom.

Q. What were the other symptoms, Doctor? I asked you that before we seemed to get off. I mean, Doctor, taking the symptoms narrated in the hypothetical question as if they were true, what symptoms aside from irritability and nervousness were of any consequence in that respect?

A. Well, I think the hypothetical question set forth the fact that he had undergone character changes characterized by staring out the window and he didn't want to associate with others, and when he was on a certain job or doing certain work he was undependable and played with articles, and things of that sort. There was a number of them. I don't recall them all, but the hypothetical question speaks for itself. Those, in addition to the irritability, made me conclude that [233] they were some evidence of a disorder of the brain as an end result of the injury.

Q. Would those symptoms taken as whole, that he is found playing with an eraser at one time, that he would occasionally go down stairs to get sympathy from a fellow legionnaire, and when he wasn't working a half dozen times maybe—it isn't specific; he was looking out the window—do you feel now as a neuropsychiatric expert that those are sufficient symptoms on which to base even a diagnosis of some deterioration mentally?

A. I think so, yes.

(Testimony of John C. Evans.)

Q. All right, Doctor. May I have Defendant's Exhibit No. 1, placed in evidence by plaintiff? Doctor, if I tell you that Mr. Mahoney was examined by physicians on April 9, 1921, May 3, 1921, August 18, 1921, January 17, 1923, January 18, 1924, April 28, 1924, February 11, 1925, April 16, 1926, October 4, 1932, and June 10, 1934, and the findings do not show any indications of mental trouble, would or would not that change the opinion you last gave?

Mr. Meindl: If your Honor please, we object. Counsel is trying to ask this witness to base his opinions upon the opinions of others.

Mr. Dillon: I am not giving the diagnosis. If it is necessary I shall be glad to read the findings from every examination. I was trying to save time.

The Court: Well, as I understand it, it is improper to ask an expert witness his opinion based on the findings of other doctors. You can ask him his opinion about certain facts.

Mr. Dillon: Your Honor, that is the rule in the Ninth Circuit. I thought I was obviating it by not making a diagnosis out of it. Two other circuits have differed, but it is still the Ninth Circuit rule. If your Honor thinks I [234] should read the findings I shall read them.

The Court: Well, I will sustain the objection in its present form.

Q. (By Mr. Dillon) In the examination of April 9, 1921 made at Minot, North Dakota the findings are: "1st l. r. molar missing. Some teeth

(Testimony of John C. Evans.)

decayed. Varicose veins slight bilateral. Chest negative. Stiffness of spine. X-ray of spine shows slight displacement between 11th and 12th dorsal vertebra and fracture of 12th dorsal 1st and 2nd lumbar vertebra." Examination of August 8, 1921——

Mr. Bynon: (Interrupting) If your Honor please, it seems to me the objection Mr. Meidl made to the asking of this witness's opinion based on the opinions of someone else is not being gotten around by calling those opinions findings. They are still the diagnoses.

Mr. Dillon: Observed facts are one thing and the diagnosis is another. I take it when he is talking about the displacement of the dorsal vertebra, and so forth, that that is an observed fact.

Mr. Bynon: Then the further objection arises, your Honor, that he is asking for unobserved opinions. In other words because a man is found to have a broken back is no sign that the doctor did or did not find something else and not state it.

The Court: Of course I can't determine that. If he wants to ask him a hypothetical question based upon certain facts he can ask it.

Mr. Bynon: Well, I wanted to save the time of the Court and jury here by not objecting to it any further. I just don't see that it is any different in the effect unless he makes a hypothetical question out of it.

Mr. Dillon: If the Court please, these are the

(Testimony of John C. Evans.)

physical findings, and if they desire me to put it as a hypothetical [235] question I shall put it that way, if these examinations show it, and as a matter of fact on second thought I am not sure we can't use the diagnosis because this evidence has been used by plaintiff and it is his diagnosis if it is a diagnosis of his doctors—he adopts it.

The Court: Well, of course, the difficulty is that the rule is that you shall not include in the hypothetical question the conclusions of any other doctor or any other expert, and that is what I have overruled. Now if you want to ask this witness any series of facts and ask him his opinion on them you will be permitted, of course.

Q. (By Mr. Dillon) The examination of January 8, 1924; I shall read merely the nervous examination. "Nervous system apparently normal"——

Mr. Meindl: (Interrupting) If your Honor please, to save time, that is still asking an opinion. "apparently normal" is the opinion of the doctor, it is not a physical finding like an X-ray.

Mr. Dillon: I don't know what more could be a physical finding; he examines the man and says "normal".

The Court: I think that I will rule that is fact and not an opinion. I think he is stating an observed fact.

Q. (By Mr. Dillon) Examination of February 11, 1925—I will confine it to the nervous system—"Normal. Urinalysis: yellow, clear." Examina-

(Testimony of John C. Evans.)

tion of April 4, 1916—I see no nervous examination. Examination of October 24, 1932; we have for the first time a complete neuropsychiatric examination. "Statement: Hospitalized for flu during service, and for injury when a pile of potato sacks fell on me, that was the day the Armistice was signed, and I was in the hospital until the next spring, then sent home on the hospital ship Mercy, and sent to hospital in New York for about two weeks, from there sent to Ft. Douglas, Salt Lake City, and there until August or September, from there sent to Des Moines, and from [236] Des Moines to Ft. Sheridan where I remained until discharged from army, S.C.D., May 22, 1920. No hospitalization since discharge but in the last year I have had four or five spells, of some kind, the first one about a year ago. I was walking along the street, my ears started to ring, and I had some sort of convulsion, I woke up in St. Vincent's hospital, remained there about 24 hours, was confused when I first came to and couldn't even tell them my name or where I lived. The next spell didn't last quite so long, I was on the street that time too. I felt like if I could get away from everybody and be alone I could fight it off, but I tried that the next time and it didn't work. I had one spell in the house, I live with my brother-in-law, and not long ago I had another one outside, I don't know how it happened but I hurt myself behind left ear, I was walking down 11th street the last I remember, and when I came to I was down

(Testimony of John C. Evans.)

on 6th street, and the blood was running down my neck, I was confused, and wouldn't even have been able to tell anyone my address, but could have walked all right. The last spell was two or three weeks ago, I woke up down in the Emergency Hospital, I was sick to my stomach, vomited and the muscles in my neck were sore, also muscles in abdomen were sore. I sleep pretty good, but it seems like I have the spells at night sometimes too, they wake me up, I might have a mild attack for a couple of nights in succession, then none for several weeks. The spell wakes me up and then I try to fight it off. I don't wet the bed or dribble in my clothes, and don't bite my tongue during the attacks. My appetite isn't very good. Bowels seem to be regular, move once a day. Sexually I'm all right. I have a dull ache in my head after the spells, and feel confused, don't think I could even tell anyone my name afterwards. Neurologic: A slender, fairly well developed and nourished white male, manifesting no disturbance in gait, station, speech or coordination, except that he has a little more difficulty standing on right foot in placing opposite heel to knee. [237] Back appears to be rigid. Musculature is in fairly good state of physical nutrition. No atrophy nor paralysis. There are no constant tremors, but at times both lower extremities tremble, more marked on the right. Sensory system: There are no complaints of pain on palpation or percussion over any area. No

(Testimony of John C. Evans.)

evidence of nerve tenderness, and no impairment of perception. Vibratory sense is normal in both lower extremities. Reflexes, deep and superficial are all present and within normal limits, except that knee jerks are obtained by suprapatellar percussion, bilateral, and while heel jerks appears to be diminished, there is a rapid movement in both ankles, like a very fine sustained clonus. Sphincters intact. No toe extension reflexes found. Patellar clonus is sustained, bilateral. Kleppelweil not found. Cranial nerves, smell, vision and taste are unimpairfed. Patient complains of roaring both ears just before seizures. 5th and 11th are negative. Mimicry, movements of tongue and deglutition are undisturbed. Eyes are not prominent; fields, grounds and movements are normal, normal cupping, no nystagmus. Pupils are equal in size, regular in outline, react normally to light and in accommodation. Thyroid gland is negative. Hands and feet are warm and dry, palms are not calloused. In the mental field, except for apprehension, and self-concern, nothing abnormal is elicited. He is quiet, pleasant and cooperative." Having those findings, Doctor, before you, would you say there was anything on the findings that I have read to you that showed mental deterioration between 1920 and 1932?

A. That report you have just read does not indicate as near as I can determine any degree of deterioration at all.

Q. Doctor, is it not true that until the diagnosis of epilepsy is coupled with psychiatric deteriora-

(Testimony of John C. Evans.)

tion there is not a diagnosis of any impairment of the mind?

A. It depends upon the case. As I understand your question, an epileptic might be psychiatric or he might not be, and if [238] he was not psychiatric he might nevertheless be deteriorated.

Q. Deteriorated, but until he becomes psychiatric you cannot say that he is insane?

A. He would have to be psychiatric in order to say that he was insane. That is true.

Mr. Dillon: Thank you, Doctor.

Redirect Examination

By Mr. Meindl:

Q. Doctor, was Mr. Mahoney psychiatric when you saw him in 1934? A. He was.

Q. If Mr. Mahoney had been in practically the same condition as when you saw him for the last ten or fifteen years was he *the* insane also?

A. I didn't understand that question, please.

Mr. Dillon: Your Honor, that is the same repitition again.

The Court: The objection is sustained. That is not proper redirect examination.

Mr. Meindl: That is all.

Mr. Dillon: That is all, Doctor.

(Witness excused)

The Court: Ladies and Gentlemen of the Jury, you will observe the former instructions. You are now excused until tomorrow morning at ten o'clock.

(Thereupon, at 5:35 o'clock P. M., December

10, 1942, an adjournment was taken until 10:00 o'clock A. M., December 11, 1942.) [239]

Portland, Oregon, December 11, 1942.
10:00 A. M.
(Pursuant to adjournment.)

The Court: You may proceed, Gentlemen.
Mr. Meindl: Call Dr. Finley.

KNOX H. FINLEY

was thereupon produced as a witness in behalf of the plaintiff herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examniation

By Mr. Meindl:

Q. Would you state your name, please, Doctor?
A. Knox H. Finley.
Q. And where do you live?
A. University Club, Portland, Oregon.
Q. And what is your profession?
A. Physician.
Q. Are you licensed to practice medicine in the State of Oregon? A. Yes, sir.
Q. And how long have you been so licensed?
A. Five months.
Q. Would you tell us what medical schools you are a graduate of?
A. Yale University, School of Medicine.

(Testimony of Knox H. Finley.)

Q. Have you specialized in any branch of your profession? A. Neurology and psychiatry.

Q. Have you done any special work in that subject? A. Yes, sir.

Q. Would you tell us what that is, Doctor?

A. It involves eight years of special training in the sciences directly dealing with the nervous system, and hospital internships with residences in both neurology and psychiatry, and three years of teaching neurology and psychiatry and some private practice in both neurology and psychiatry. [240]

Q. Would you tell us where you had this special training?

A. At the Massachusetts General Hospital in Boston, Massachusetts in neurology, abroad in Amsterdam in neurology, in the Boston Psychiatric Hospital, Boston, Massachusetts, in psychiatry.

Q. And where did you teach the subject, Doctor?

A. I taught neurology and psychiatry at the Harvard Medical School for three years.

Q. Doctor, have you examined William V. Mahoney, the insured in this case?

A. Yes, sir.

Q. When did you make your examination?

A. On the morning of December 9, 1942.

Q. And Doctor, what were your findings at that time?

A. When I examined Mr. Mahoney on this date he was a very dull individual. His responses to questions were rather slow and sometimes hesitant.

(Testimony of Knox H. Finley.)

Although his memory for the events early in his life are quite normal his memory for more recent events was impaired. His grasp or knowledge of events at the time, particularly with regard to the World War and the position of our troops, was distinctly limited. He made conflicting statements with regard to his present illness that led me to believe that his memory regarding it was rather impaired—partially impaired.

Q. Did you make any test with regard to the condition of his brain, Doctro?

A. I did what is known as an electroencephalogram, that is, regarding the electrial frequency discharges from the brain, by placing electrodes over the various parts of the head, and the pattern that was obtained from that record showed that the brain was not functioning normally.

Q. Doctor, do you have an opinion whether or not Mr. Mahoney is of an unsound mind at the present time?

A. My opinion at the time that I saw Mr. Mahoney was that he was of unsound mind.

Q. In your opinion is there any cure for that condition? A. No, sir.

Q. How does that state of unsound mind that you found affect [241] his judgment?

A. Well, his judgment would be impaired in his lack of acute thinking and in the fact that his memory is partially impaired. His judgment, would be defective, it seems to me.

(Testimony of Knox H. Finley.)

Q. Doctor, would you assume for the following question that the following facts are true: Assume an individual prior to July 15, 1917 was normal mentally and physically and then entered the Army on that date, and assume further, Doctor, that in January of 1920 while home on a furlough for a few weeks it was noticed that he was very nervous and quarrelsome and hard to get along with, seemed to be afraid of something, his mind seemed to be rambling, his conversation was rambling and disconnected, he never could stay on one thing at a time, felt that someone was always trying to do him wrong, that everyone was down on him, that he was changed considerably from what he was before he went into the Army, that he didn't seem to care for anything in January of 1920, he would just sit around the house and would listen with a stare on his face, you would have to talk to him several times to get an answer out of him, imagined everybody was bothering him, that somebody was after him, that he would sit and stare, didn't seem to want to talk to anyone, that he was very nervous and felt people were against him, that that condition was also noticed in the summer of 1920 after his discharge from the Army, was noticed again in 1927—may I have the deposition? Also the same symptoms were noticed in 1937 or 1938 while a patient in the Roseburg Hospital for mental patients. I should also say, assume that individual was in the same condition that you found Mr. Mahoney to be in at the date of your examination

(Testimony of Knox H. Finley.)

of Mr. Mahoney. Would you have an opinion as to the mental condition of that patient back in January of 1920 when he was home on his furlough?

A. Well, assuming that the information which you have just presented is true my opinion would be—— [242]

Mr. McGan: (Interrupting) I ask that the answer be stricken as not responsive, your Honor. The question was, did he have an opinion?

The Court: That was the question.

Mr. Meindl: That is correct.

Q. Do you or do you not have an opinion, Doctor, first, and then we will ask what it is. A. I do.

Q. Would you state what that opinion is, Doctor?

Mr. McGan: If the Court please, we object to that. It invades the province of the jury and the hypothetical question is unfair in that it assumes facts to be true not shown by the evidence.

The Court: I don't think the question in total effect is unfair. It may be that some of these facts are not entirely established by evidence. You may argue that to the jury. Counsel has a right to ask any hypothetical question, and of course the jury must determine whether the facts are true. He may answer.

Q. (By Mr. Meindl) What is that opinion, Doctor?

A. My opinion is that in—was it 1920 or '21?

Q. January of 1920 when he came home on a furlough.

(Testimony of Knox H. Finley.)

A. That in January, 1920 this man was at that time mentally ill, that is, the illness that he presented at the time I saw him was in existence at that time.

Q. In your opinion would that individual be of an unsound mind at that time? A. Yes.

Q. Doctor, was that such a condition, assuming these same state of facts, that was curable?

A. Would you ask that again, please?

Q. Assuming the same state of facts, Doctor, was that condition a curable or incurable one?

A. Well, on the basis of my—— [243]

The Court: (Interrupting) Just a moment; I think you are going too far when you ask that at that time. You can ask about his present condition.

Mr. Meindl: Do I understand, your Honor, that the Doctor would not be permitted to give his opinion as to whether or not, assuming all those facts to be true, it was a curable or incurable condition?

The Court: I take it that you are asking there one of the key questions of the case. I think you could ask him from his observation now whether it is curable at the present time.

Mr. Meindl: Well, he has already so testified, that it is not curable.

The Court: Yes, I so understood.

Mr. Meindl: You may cross-examine.

(Testimony of Knox H. Finley.)

Cross-Examination

By Mr. Dillon:

Q. Doctor, as I understand it, you first examined and saw this man the 9th of December, 1942?

A. Yes, sir.

Q. You never saw him before? A. No, sir.

Q. You never made any examinations before that? A. No, sir.

Q. Was this examination made for the purpose of testifying at this trial? A. Yes, sir.

Q. And was your examination based on the history given to you by the patient?

A. Partially only.

Q. To what extent?

A. To the extent of questioning him about his epileptic condition and the injury which he received when he was in the Army, in the armed forces preceding 1920, I believe. [244]

Q. How much part did that history play in your final diagnosis?

A. May I ask you, in my questioning or in my total examination of the patient?

Q. The total examination of the patient.

A. From my examination of the patient and the questioning of the patient and the fact that he had scars on his tongue my opinion was that the patient had had epileptic attacks for——

Q. (Interrupting) I didn't ask you that, Doctor. That isn't in your diagnosis. I asked you the question, to what extent did the history given to

(Testimony of Knox H. Finley.)

you make up in your diagnosis, which I understand is of unsound mind——

Mr. Meindl: (Interrupting) If your Honor please, we object to counsel not letting the witness finish his answer. He was answering the question very definitely.

The Court: The objection is overruled. This is cross-examination. Counsel has wide latitude in that regard. Proceed.

A. It is a little difficult to answer. It influenced my——

Q. (Interrupting) Could you have made a diagnosis if you had not had the history the patient gave you? A. No.

Mr. Dillon: Your Honor, I ask that the testimony be stricken.

The Witness: That is the history, not my examination.

The Court: Now just a moment; you are just here to answer questions. Counsel is arguing to the Court.

Mr. Dillon: He said he made the examination for the purpose of testifying at this trial, and it is not permissible for a history to be given for that purpose, as it is a self-serving declaration.

Mr. Meindl: May I be heard, your Honor, on that?

The Court: Yes.

Mr. Meindl: This being a mental condition, your Honor, is an exception to the general rule on that, in that it isn't basing the history as being

(Testimony of Knox H. Finley.)

matters of fact. In a neurological [245] examination you talk to a patient just like you examine a man with a broken arm. That rule is not applicable in this type of case.

The Court: The motion is denied.

Q. (By Mr. Dillon) Doctor, would you point out to me the symptoms in the hypothetical question that are a sufficient basis for you to express an opinion that this man was of unsound mind in 1920?

A. The delusions or ideas of persecution, his rambling and irrelevant speech, his unstable, erratic behavior, are the main symptoms which lead me to base my opinion.

Q. And what were those delusions of persecution? A. I do not know.

Q. And what was that rambling speech?

A. I do not know.

Q. And what was the unstable behavior?

A. The fact that while the man was employed he often went off by himself in secluded places, isolated places, and had a stary expression.

Q. Was that included in the hypothetical question, Doctor, that statement that you have given?

A. No, it was not.

Q. Then, Doctor, you are willing as an expert in neuropsychiatry on those two *o*solated—not facts but statements presented to you to hazard an opinion on those facts that this man was of unsound mind in 1920?

A. Assuming that they are correct, yes, sir.

(Testimony of Knox H. Finley.)

Q. Then Doctor, you have no facts from 1920 to your present examination, and do I understand you to say that he continued of unsound mind from 1920 until the date of your examination?

A. I had the occasion to look through the records, both Government records and Veteran records of the patient in the Veteran's Hospital—— [246]

Q. (Interrupting) Doctor, I will ask you in those examinations from 1922 to 1934 what you found on which to base an opinion that this man was of unsound mind—if you do have that opinion; you haven't expressed it yet—from 1922 to 1934.

A. I can't answer that because I don't remember definitely the dates of these hospital examinations.

Q. I will tell you there was no hospital examination until 1934. What then would you find in those reports you examined between 1922 and 1934 on which to base an opinion, if you have one, that this man was of unsound mind from 1920 to 1934?

A. On the basis of the history that the patient had been an epileptic, had had his first epileptic attack, I believe it was in 1929 or 1930. That would lead me to believe that he was certainly mentally unsound, I feel, at that time.

Q. And I understand you to say because a man has an epileptic convulsion in 1929 he is ipso facto of unsound mind? A. No.

Q. Wasn't that what you said, that that is what you picked out, that in 1929 as you recalled it he had an epileptic seizure, and that was the basis

(Testimony of Knox H. Finley.)

why you said you thought he was of unsound mind?

A. The diagnosis in those hospital records is epilepsy with mental deterioration, and it is my opinion that he was mentally deteriorated preceding his admission at the hospital at that time.

Q. That wasn't the question, Doctor. I asked you before 1934. That is the first hospital examination. What is there in any of those reports on which you might base a diagnosis of unsound mind? A. Nothing.

Q. And then do you still contend, when there is nothing there, that this man was of unsound mind during the years 1920 to 1934?

A. On the basis of the—— [247]

Q. (Interrupting) I say, first, do you express that opinion?

A. Do I still express that opinion now?

Q. That the man was of unsound mind, when you say there was nothing in those reports on which to base such a diagnosis. Do you still say that between 1920 and 1934 this man was of unsound mind? A. That is my opinion.

Q. Based on what, Doctor?

A. Based on his behavior, mental reactions, and as given in the hypothetical question, which facts if correct lead me to believe that he was at that time showing evidence of his present mental illness.

Q. Showing evidence—but do you still contend that evidence was sufficient to say he was of unsound mind? A. Yes.

(Testimony of Knox H. Finley.)

Q. Doctor, will you point out in that hypothetical question any evidence of that between the years 1927 and 1934?

A. Between 1927 and 1934?

Q. Yes. A. I cannot.

Q. Then on what basis do you still say this man was of unsound mind between the years 1927 and 1934?

A. On the basis of my knowledge of this type of mental picture and the evidence that the man's brain at the present time is not a normal organ, that this condition in my opinion existed well before 1934.

Q. You have given your opinion, Doctor. I am asking for the basis of it. What is there in the hypothetical question or in any information contained in the file or any information given by this man at this trial that indicates to you the condition of this man's mind from 1927 to 1934?

A. I know of none.

Q. And yet you continue to express your opinion that he was in that period of unsound mind? [248]

A. That is my opinion.

Q. Doctor, what do you mean by "unsound mind"?

A. I mean by "unsound mind" an alteration either in a man's judgment, behavior, memory, or emotional reactions, one part or all of these things.

Q. Is unsound mind synonymous with insanity?

Mr. Meindl: If your Honor please, that would be a legal question, the definition of what insanity is.

(Testimony of Knox H. Finley.)

The Court: No, it is not a question of law. The Doctor is testifying as an expert and is using certain terms. Counsel has a right to ask the meaning. He may answer.

The Witness: Would you present your question again, sir?

Mr. Dillon: Would you kindly read it, Mr. Reporter?

(The question was read)

A. The term "insanity" is not a term that is used a great deal in medicine. It is a term that has a very loose meaning and it depends upon your definition of insanity whether it is synonymous with an unsound mind. If you mean by insanity any alteration in the personality, in the way of judgment, emotional reaction, behavior, memory, then it is. If you mean by insanity, as it is often used, that it is a severe type of emotional breakdown or mental deterioration, then it is a severe type of unsound mind.

Q. Is the medical definition—term—for insanity a man suffering with psychosis?

A. Well, I am unable to state that that is a definition that is presented in a medical dictionary, but it is sometimes used as being synonymous with psychosis, yes, sir.

Q. At any time during the life of this man from 1920 to 1934 do you find anything in the hypothetical question, in your examination, or in the medical records between those periods to indi-

(Testimony of Knox H. Finley.)

cate that this man ever was suffering from a psychosis?

A. There is information given that leads me to the opinion that this man was suffering from a psychosis between—— [249]

Q. (Interrupting) What is that information?

Mr. Bynon: If your Honor please, I hesitate to interrupt counsel, but I do not think we should sit here without objecting to his cutting off the witness' answer.

Mr. Dillon: Oh, I beg your pardon; I didn't know I had.

Mr. Bynon: He doesn't mean anything by it, but it isn't fair to the jury.

The Court: I think that is correct.

Mr. Dillon: I certainly beg your pardon.

The Court: I will give you an opportunity to complete the answer. Will you read the question?

(The record was read.)

A. (Continuing) One of the hospital reports and the history gave information that led me to believe that this patient had been psychotic—had a psychosis in relation to his epilepsy, probably in 1929 or 1930.

Q. (By Mr. Dillon) What examination was that, Doctor, that you obtained any such history from?

A. It was one of the Veterans Hospital reports.

Q. For what year?

A. I am not certain. I believe it was——

(Testimony of Knox H. Finley.)

The Court: (Interrupting) If you are going to ask the Doctor about the record, produce it.

Mr. Dillon: Your Honor, I don't know which record he refers to.

The Court: You have the reports of the Veterans Bureau.

Mr. Dillon: Yes, but they are numerous, and I thought if he could tell us which one——

The Court: If you are going to examine the records you will produce them for him.

Mr. Dillon: I don't wish to argue at all, your Honor. He made reference——

The Court: (Interrupting) No, you don't need to argue. Pass him up that file of the Veterans Bureau and let him look [250] at it. He will be able to tell you, probably.

A. On October 24, 1932—is this all from the Veteran's Hospital?

Mr. Dillon: Yes.

The Witness: In one of the Veterans Hospital's reports the patient himself gives a history of having had spells in 1931, and his wife at a later time, which was obtained April 5, 1934—"from the social history as given by the wife it is evident that he first started having seizures over five years ago." That was the statement I referred to.

Q. Then I understand you to say at this time that the fact he had a seizure was the basis for you to say he was suffering from a psychosis.

A. No.

Q. That was the question as I remember, Doc-

(Testimony of Knox H. Finley.)

tor. What was there to base any opinion this man was suffering from a psychosis between 1927 and 1934?

A. Well, it had been observed in some of the records here that the patient had a post-psycotic episode—had post-epileptic psychotic episodes, that is, he became psychotic following some of his epileptic attacks.

Q. Where is that to be found, *Cotor*? At what time?

A. It is based in part upon the diagnosis of epilepsy with mental deterioration.

Q. No, Doctor, I am sorry, not the diagnosis, the findings. As a matter of law, as the Court has stated, it can't be based on the diagnosis.

A. On October 10, 1935 there is a statement that the patient is psychotic at this time, and at this time, October 11, 1935, he is said to be hazy, his speech irrelevant, rambling, at times delusional. I don't believe there are any further facts in the record——

Q. (Interrupting) Doctor, what is there in those that you [251] found in October, 1935 that throws any light on your opinion that he was suffering from a psychosis from 1927 to 1934?

A. In these records?

Q. Yes. A. Facts?

Q. Yes. A. None.

Mr. Dillon: That is all.

(Testimony of Knox H. Finley.)

Redirect Examination

By Mr. Meindl:

Q. Doctor, what are the symptoms of a patient when he feels that people are against him, when he is very nervous, sits with a vacant stare, his conversation is rambling and disconnected and he imagines everybody is against him, that somebody is after him, when he is found staring out of the window or staring into space with a fixed stare, takes a prejudice against certain people, and that is a changed condition from the way that individual has been before, a changed personality? What is that evidence of?

Mr. McGan: If the Court please, I object to that as not proper redirect. It was gone into on direct.

The Court: The objection is sustained.

Mr. Meindl: No further questions.

(Witness excused.)

The Court: You may take a short recess, Ladies and Gentlemen.

(A recess was then taken, after which proceedings were resumed as follows:)

Mr. Meindl: If your Honor please, the plaintiff offers part of the Pre-Trial Exhibit No. 10, the part being offered being the commitment and also the note of the hospital at Salem. [252] Those can be marked as 10-A and 10-B.

Mr. McGan: If the Court please, I was under the impression that the exhibit was offered in evidence yesterday when Dr. Evans testified in its entirety.

Mr. Meindl: It was not offered, your Honor.

The Court: Anyhow this present portion is admitted if it is not already in. [253]

(The commitment was thereupon received in evidence and marked Plaintiff's Exhibit 10-A, and is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT 10-A

In the Circuit Court of the State of Oregon for the County of Multnomah, Department of Probate

In the Matter of The Examination of Wm. V. Mahoney Charged as insane

ORDER

The above matter having come regularly on for hearing before the court, and being fully advised in the premises, and having made its Findings of Fact,

Now, Therefore, it is hereby ordered and adjudged that until said insane person shall be discharged from the.....Oregon State Hospital to which he has been committed;

Now, Therefore, it is hereby ordered and adjudged that neither the estate nor any legally responsible relative of such insane person is able to pay the costs of the latter's care and maintenance.

Done in open court this 9 day of March, 1934.

GEORGE TAZWELL
Circuit Judge

U. S. District Court
District of Oregon

[Endorsed]: Filed Dec. 12, 1942. [254]

Plaintiff's Exhibit 10-A—(Continued)

INSANE COMMITMENT—WARRANT—2

In the Circuit Court of the State of Oregon for the County of Multnomah

Department of Probate

In the Matter of the Examination of Wm. V. Mahoney Charged as Insane

WARRANT

To Martin T. Pratt, Sheriff of said County, and
To R. E. Lee Steiner, Superintendent of the .....Oregon State Hospital at Salem, Oregon.

Whereas, Wm. V. Mahoney has been this day duly examined as to his sanity, and upon the certificate of Max Himmelfarb a competent physician, a copy of which is hereto attached, it has been duly adjudged and determined that said person is insane and that he is committed to the..... Oregon State Hospital for the Insane at Salem, Oregon; and it having been ascertained that the true name of said person is Wm. V. Mahoney; age 37; nativity American; permanent residence.....; and the cause of such insanity.....

Now, Therefore, you are hereby commanded to take and safely keep and properly care for the said Wm. V. Mahoney and promptly and safely deliver him to the proper authorities of said.....

Plaintiff's Exhibit 10-A—(Continued)

Oregon State Hospital at Salem, Oregon, in the manner provided by law.

GEORGE TAZWELL
Circuit Judge

(Note—Sheriffs in telegraphing for attendants should give name, character, condition and sex of patients; also how many attendants they believe necessary.) [255]

INSANE COMMITMENT—NOTICE OF INSANITY—2

In the Circuit Court of the State of Oregon for the County of Multnomah
Department of Probate

In the Matter of the Examination of Wm. V. Mahoney Charged as Insane

NOTICE OF INSANITY

To the Hon. George Tazwell, Circuit Judge of said County:

The undersigned petitioner respectfully represents and shows to your Honor that Wm. V. Mahoney, a resident of the City or Town of Portland, County of Multnomah, State of Oregon, is an insane person, and by reason of such insanity is unsafe to be at large, or is suffering from exposure or neglect; that he has relatives, to wit:

. . . . . .

. . . . . .

Plaintiff's Exhibit 10-A—(Continued)

Wherefore, Your petitioner prays that you cause said Wm. V. Mahoney to be brought before you, at such place as you may direct, and due inquiry made as prescribed by law, concerning the matter alleged in this notice.

LESLIE L. WATSON

State of Oregon
County of Multnomah—ss.

Leslie L. Watson

the petitioner above named, being first duly sworn, severally says that the foregoing petition is true, as he verily believes

LESLIE L. WATSON

Subscribed and sworn to before me this 9 day of March, A. D. 1934.

(Circuit Court Seal)

A. A. BAILEY,
County Clerk
MERLE S. HOTCHKISS,
Deputy [256]

INSANE COMMITMENT—CERTIFICATE OF EXAMINING PHYSICIAN—3

In the Circuit Court of the State of Oregon for the County of Multnomah
Department of Probate

In the Matter of the Examination of Wm. V. Mahoney Charged as Insane

Plaintiff's Exhibit 10-A—(Continued)

CERTIFICATE OF EXAMINING PHYSICIAN

State of Oregon,
County of Multnomah—ss.

I, Max Himmelfarb, being first duly sworn, depose and say that I am a graduate of medicine and have practice my profession 7 years from the date of my diploma; that at the request and in the presence of Honorable George Tazwell, Circuit Judge of said County, I have carefully examined Wm. V. Mahoney in reference to the charge of insanity, and do find that he is insane.

The fact elicited by said examination are set forth in answer tot he following questions:

(Note—The examining physicians will please answer the following questions as fully as they can, as this certificate affords all the reliable information in regard to the previous history of the patient that the Superintendent of the Hospital can obtain.)

1. Patient's name: Wm. V. Mahoney
2. Residence? Does not know his address
3. Place of birth? Flandreau—So. Dakota
4. Industry or business in which work was done, as silk mill, sawmill, bank, etc.....
5. Date deceased last worked at this occupation (month and year).....
6. Total time (years) spent in this occupation: Bookkeeper—accountant
7. Neight? 5 ft. 11 in. 8. Weight?.....
9. Color of hair? Red. 10. Color of eyes? Blue.

Plaintiff's Exhibit 10-A—(Continued)

11. Date of birth (month, day, and year) April 11, 1896?
12. Race? W. 13. Education? College [257]
14. Religion? Cath.
15. Number of children living and number dead? .....
16. Age when first child was born? .....
17. Age of youngest child? .....
18. Any deformed or defective children? .....
19. How long in Oregon? 8 years.
20. How long in U. S.? Native
21. Name and birthplace of father? Thomas Mahoney—Ireland
22. Maiden name and birthplace of mother? Johanna McMahon—Minnesota
23. Cause of death of father? Dead—Cancer
24. Cause of death of mother? Senility
25. What relatives have been insane, epileptic, defective or criminal? None

Insane Commitment—Certificate of Examining Physician—4

26. Habits of parents? Good
27. Is patient single, married, widowed or divorced? Married
28. Name and address of husband, wife, or nearest relative? Mrs. Claire Mahoney—wife
29. Patient's habits? Drinks moderately
30. Is patient suicidal or homicidal? Suicidal. [258]
31. Number of attacks and duration of present attack? Attempted to commit suicide

Plaintiff's Exhibit 10-A—(Continued)

32. Give details of previous attacks? Was drunk. Tried to aboid someone by jumping into river.
33. Assign cause of attack? Delusions of persecution
34. Earliest symptoms noted and mode of development? Imagined that someone tried to get him.
35. Sleep? Fair
36. Memory? Poor
37. Headache or neuralgia?.....
38. Delusions, character of; are they fixed or changeable? Changeable
39. Hallucinations and illusions, whether or sight, hearing, taste or smell? Hearing, sight
40. Is patient noisy, restless, destructive or depressed? Restless, depressed
41. Brief history of diseases or injuries?
42. Age when menses appeared?
43. Amount and character before and since insanity appeared?
44. If past change of life, was it sudden or gradual, and symptoms?
45. Natural temperament and mental capacity? Poor at present
46. Is there loss or increased knee jerk, visual or pupilary defects? None
47. Has patient or parents had syphilis?
48. To what extent has patient used alcohol, opium or tobacco? Alcohol

Plaintiff's Exhibit 10-A—(Continued)

Insane Commitment—Certificate of Examining Physician—5

49. Are there bruises, scars or other evidence of present injury?
50. Has patient been exposed to any contagion? No [259]
51. Have there been any convulsive seizures? Question of epilepsy
52. Give history with dates of previous "strokes" or paralysis?
53. What treatment has been employed?..... ment? Rank and organization? Date and place of discharge? Which war?

Additional remarks?.....

.....

Names and addresses of relatives, guardians or friends to be notified in case of death, sickness, or discharge from Hospital, and who will furnish clothing and other necessary articles? Mrs. Clara Mahoney—Wife 621 S. E. Sixth Ave. Portland, Oregon

MAX HIMMELFARB M.D.

Subscribed and sworn to before me this 9 day of March, 1934.

(Circuit Court Seal)

A. A. BAILEY,
County Clerk
MERLE S. HOTCHKISS,
Deputy

Plaintiff's Exhibit 10-A—(Continued)

Insane Commitment—Order of Commitment—6

Be It Remembered, That at a regular term of the Circuit Court of the State of Oregon for the County of Multnomah, begun and held at the Courthouse in said County and State, on the 5 day of March, A. D. 1934, when were present: The Honorable George Tazwell, Judge, presiding:....., Clerk; ....., Sheriff: ....., District Attorney.

Whereupon, on the 9 day of March, A. D. 1934, the following proceedings were then had, to-wit:

[260]

In the Matter of the Examination of
Wm. V. Mahoney Charged as Insane

ORDER OF COMMITMENT

By virtue of a notice and petition filed in the above-entitled matter, I this day caused the said Wm. V. Mahoney to be brought before me at Portland in said county of Multnomah, State of Oregon, at 4:00 o'clock P. M.; also caused to appear at the same time and place Max Himmelfarb, competent physician, proceeded to examine the said Mr. V. Mahoney, and find as follows:

That the true name of the person named in the said complaint and petition is Wm. V. Mahoney; age 37 years; nativity American; present residence Portland; and the cause of such insanity.....
.....that Max Himmelfarb, competent physician....., after careful examination, has certi-

Plaintiff's Exhibit 10-A—(Continued)

fied on oath that the said Wm. V. Mahoney is insane and unsafe to be at large.

It Is Therefore Considered, Ordered and Adjudged, That the said Wm. V. Mahoney, is an insane person, and that he be and is hereby committed to the Oregon State Hospital for the Insane at Salem, Oregon, and there placed in charge of the officers having the aforesaid Hospital in charge, as provided by statute.

GEORGE TAZWELL
Circuit Judge.

Insane Commitment—Findings of Fact—7
In the Circuit Court of the State of Oregon
For the County of Multnomah
Department of Probate

In the Matter of the Examination and Commitment of Wm. V. Mahoney An Insane Person

FINDINGS OF FACT

The above-entitled matter having come regularly on to be [261] heard before the court this day.....
.....the wife (or husband).....
the father and mother respectively,.....
the children, and.....and
.....other interested persons,
as witnesses, and said persons having been examined under oath as witnesses by the court for the purpose of determining the financial ability of said insane person, his estate and/or relatives, to pay the costs and expenses of the car, maintenance, board,

Plaintiff's Exhibit 10-A—(Continued)

lodging and clothing of such insane persons at the hospital to which he has been committed, and the court being fully advised in the premises, makes the following Findings of Fact:

(1) That the estate of the said insane person, Wm. V. Mahoney, consists of real property of the value of at least $ none, and personal property of the value of at least $ none, and is subjects to debts and incumbrances in the sum of $....., and the said estate is not financially able to pay such costs and expenses.

(2) That said Clara Mahoney, the wife of said insane person, is the owner of property of the value of at least $ none, and is earning, or is capable of earning, the sum of at least $40.00 per month, and has no persons dependent upon him (or her) for support, other than said insane person, and is not financially able to pay such costs and expenses.

(5) That except as hereinbefore found by the court, neither the estate nor any of such relatives of said insane person is financially able to pay such costs and expenses.

Done in open court this 9 day of March, 1934.

GEORGE TAZWELL
Circuit Judge

[Endorsed]: Filed Mar. 9, 1934. [262]

(Plaintiff's Exhibit No. 10-B was thereupon received in evidence, and is in words and figures as follows, to-wit:)

PLAINTIFF'S EXHIBIT No. 10-B

Oregon State Hospital

CONTINUED NOTES

Name Mahoney, William V. No. 10441 Date Admitted Mar. 9, 1934.

Mar. 10, 1934: Age 37, married. Bookkeeper. Residence, Portland. Physical health fairly good. His tongue is bitten on both sides anteriarly. Patient states that he suffered a dislocated and broken back while in France during the Armistice. Claims that this injury gives him no trouble at the present moment. However, he is drawing compensation at the rate of $45 per month. Commitment claims he drinks moderately and is suicidal. Recently tried to jump off the bridge into the river, particularly to avoid someone whom he thought was after him. Has delusions of persecution. Imagines someone is trying to kill him. Delusions changeable. Hallucinations of hearing and sight, is restless and depressed. There is a question of epilepsy in his case. This morning patient exhibited a badly bitten tongue and gave the history that recently he thought a certain policeman in Portland was framing him, put up a gag upon him and got his name mixed into it and took a very serious dislike to him. Says there was no reason for this, but the policeman attacked him upon the bridge and was going

to throw him into the river. In fact, when the bitten tongue was discovered, epilepsy was at once suspected and the patient admits that he had his first spell about 10 years ago and has had many convulsions since that time, that he has them about once a month and sometimes he will have two or three spells in short order. In fact, he was some what dazed and it was impossible for him to give a dependable history this morning. [264]

Diagnosis: 17-A. Epileptic deterioration.

JCE B

Mar. 13, 1934:Blood Kahn test, negative.

Mar. 14, 1934: Fluoroscopic Examination. Negative heart and lungs.

Apr. 5, 1934: Discharged for transfer to American Lake.

U. S. District Court
District of Oregon

[Endorsed]: Filed Dec 12 1942 [265]

Mr. Meindl: Your Honor, may we have leave of the Court to have those two documents photostated and photostats substituted in place of the originals?

Mr. McGan: No objection.

The Court: Permission is granted.

Mr. Meindl: Plaintiff rests, your Honor.

Mr. Dillon: If the Court please, may the Government at this time make a motion outside of the presence of the jury?

The Court: I think you will have to make your

motion in the presence. The argument may be made out of the presence.

Mr. Dillon: Comes now the defendant at the close of plaintiff's case and asks the Court to dismiss the complaint on the grounds and for the reasons, first, that it affirmatively appears that the Court has no jurisdiction to hear and determine this case, that there has been introduced in this case no substantial evidence tending to prove that the insured was insane or that he was rated as incompetent or insane by the Veterans Administration on or prior to July 3, 1931; that it affirmatively appears from the evidence in this case that on and before July 3, 1931 the assured was not insane and that [266] he was not rated by the Veterans Administration as incompetent or insane.

The Court: Ladies and Gentlemen, counsel desire to argue a question of law before the Court. You may retire during the time or argument.

(The jury thereupon withdrew from the courtroom, and the matter was argued to the Court.)

The Court: I will submit it to the jury. Motion denied. Call the jury.

(The jury was thereupon called into the courtroom and further proceedings were had in their presence as follows:)

The Court: Proceed. Motion denied. Exception allowed.

Mr. McGan: If the Court please, the defendant offers now in evidence Pre-Trial Exhibit No. 9,

depostion of Thomas McGrath, Minot, North Dakota, Blanche Callahan, Minot, North Dakota, and Nels O. Nelson, Minot, North Dakota. May we read them from the table, your Honor? We have only one copy.

The Court: Yes.

Mr. Dillon: Will counsel be allowed to read both question and answer?

The Court: Yes.

(The depositions of Thomas J. McGrath, Nels O. Nelson, and Blanche Callahan, Defendant's Pre-Trial Exhibit No. 9, were then read to the jury; said depositions, omitting all formal parts, are in words and figures as follows, to-wit:)

T. M. McGRATH

being first duly sworn, testified as follows:

Direct Examination

By Mr. McGan:

Q. State your name.

A. Timothy J. McGrath. [267]

Q. Where do you live?

A. 204 East Seventh Street, Minot, North Danota.

Q. What is your business?

A. Accountant for the Northern States Power, Minot.

Q. As such accountant have you personal supervision of the original payroll records of the company? A. I do.

(Deposition of T. M. McGrath.)

Q. Do you have a record of the employment with the Northern States Power Company of William V. Mahoney?

A. Yes, sir, on our records, the records I have with me, it is shown "W. Mahoney."

Q. And are those records that are kept in the ordinary course of business? A. Yes, sir.

Q. Are they made reasonably contemporaneously with the events and facts recorded there?

A. Yes, sir.

Q. Are they records your company requires you to keep? A. They are.

Q. And they are pursuant to that requirement of the company kept in the ordinary course of business? A. Yes, sir.

Q. Will you consult your record—do you know this man Mahoney? A. I do not.

Q. You have no information of your own knowledge as to his employment with the company?

A. None whatsoever, except as appear on the record.

Q. Will you consult your record, if you please, sir, and tell us when Mr. Mahoney was first employed for the Northern States Power Company?

A. The first record of Mr. Mahoney is in July 1920.

Q. What date in July, please?

A. He was hired at a salary of $75. a month and for the first two weeks period was paid $37.50, so I assume he was hired on the first of July as an office boy. [268]

(Deposition of T. M. McGrath.)

Q. Did he continue working throughout that month?

A. He did the entire month of July.

Q. Do *you* records show how much he was paid for the second half of the month? A. $37.50.

Q. Do you have a record of the number of days he worked that month?

A. Not by days. Apparently at that time if they did keep a record by days, and I assume they did some place, we are unable to locate them at the present time. And I might also mention that the policy of the company has been to pay a man in full if he was off for a day or two at the time because of sickness. There is nothing on here to indicate whether or not he was off any portion of that month.

Q. If he had been absent from his work any portion of that month, could that have been recorded on the records you have before you?

A. No, sir, not for the month of July. It is in later periods here.

Q. Do your records show he continu*e*d to work throughout the month of July?

A. He was paid for the full month and I assume he did.

Q. Now, the next month, the month of August?

A. August, 1920, he was paid $37.50 for the first half, and the same amount for the second half.

Q. And in the same position?

A. In the same position.

Q. And the next month, please.

(Deposition of T. M. McGrath.)

A. September, 1920, Mr. Mahoney was paid $75. for the month.

Q. In the same position?

A. In the same position.

Q. Now, in the next month?

A. October, 1920, he was paid the same amount in the same position. [269]

Q. And the next month, November?

A. November, 1920, he was paid the same amount in the same position.

Q. And all of these months we have gone over, Mr. McGrath, have you noticed whether there is any record of his being off any time because of illness?

A. There isn't, but these records so far wouldn't indicate that.

Q. Now, the next month?

A. December, 1920, Mr. Mahoney was paid $75. for the month in the same position. Beginning with January 1921, the payroll sheets indicate whether or not an employee was absent.

Q. Will you consult your records for the month of January and state what was his salary for that month? A. $75. per month.

Q. Was he in the same position?

A. As a clerk.

Q. As a clerk at this time. That is a change from that office boy?

A. There is no title shown for August 1920, and September 1920 he is shown as a clerk.

Q. He is shown as a clerk from September?

(Deposition of T. M. McGrath.)

A. That is the first change. Whether that indicates an advance or change in title, I wouldn't know. The salary is the same.

Q. Do your records for January 1921 indicate how many hours the man worked per day?

A. He worked eight hours per day.

Q. Is that for the full week?

A. That is for the Monday through Saturday. I assume that is the third through the eighth. He worked forty-eight hours. The tenth through the fifteenth, he worked forty-eight hours. The seventeenth through the twenty-second he worked forty-eight hours. The twenty-fourth through the [270] twenty-ninth, he worked forty-eight hours, and he worked eight hours on the 31.

Q. And the salary? A. $75. per month.

Q. So that there is no time lost for any reason whatever during January?

A. Not according to our records.

Q. Now, the next month of February?

A. No time lost during February.

Q. His salary? A. $75. per month, clerk.

Q. And the next month?

A. March, 1921, a total of 104 hours on the first half of the month. A total of 112 hours in the second half. No time lost according to the records; salary, $75. per month.

Q. Now, the next month?

A. April 1921. There was no time lost in that month; pay, $75. as a clerk.

Q. He worked the average number of days?

(Deposition of T. M. McGrath.)

A. He worked the usual number of hours.

Q. And the usual number of hours each day?

A. That is right.

Q. And the next month?

A. May 1921. According to the records there was no time lost any time during the month. He received $75. for the month as a clerk.

Q. And the next one?

A. June 1921, no time lost. He received payment of $75. as a clerk.

Q. And the next month?

A. July 1921 indicates no time lost; received $75. for the month as a clerk. August 1921 shows no time lost; payment of $75. for the month as a clerk. September 1921 no time lost; received $75. for the month as a clerk. October 1921, [271] Mr. Mahoney was absent according the the *recors,* October 28, 29, and 31. He received full pay of $75. for the month in the position of clerk.

Q. Do your records indicate why he was absent? A. It does not.

Q. And you, of course, do not know of your own personal knowledge? A. I do not.

Q. Now, the next month.

A. November 1921, according to the records, Mr. Mahoney was off on the 26 of the month, received full pay of $75. as a clerk.

Q. Do your records show whether or not he worked the other days in the month?

A. He worked the other days in the month, with the exception of Sunday.

(Deposition of T. M. McGrath.)

Q. Now, the next month?

A. December 21, Mr. Mahoney apparently worked the entire month, received $75. in salary in the position of clerk.

Q. Were there any days lost at all?

A. No days lost, according to the records, in the month of December 1921.

Q. What was the last day he worked in December? A. December 31.

Q. In the next month?

A. January 1922, the name does not appear on our payroll records.

Q. Do you know of your own knowledge whether or not he left your employ at that time?

A. I assume he did. Raymond Abbott appears as a clerk, and his name did not appear until that time. That seems to complete our records in the case of Mr. Mahoney.

Q. These records you have been testifying from, Mr. McGrath, state whether or not they are your original payroll records? [272]

A. They are our original records in so far as the payment of salary is concerned. I do not know whether there are any supplemental records, but I assume there were turned in by the heads of the department covering hours of time, work by the employees, and the various accounts to which such time should be properly charged.

Q. But these records are, so far as the auditor's office of the Northern States Power Company is

(Deposition of T. M. McGrath.)

concerned, your own original records? They are the records made by the auditor's office?

A. That is right, covering the payment of salary; and since January 1921, covering the hours worked by each employee.

Q. Is this man carried on your books throughout as "W" Mahoney, or under what name?

A. In some instances he is shown as "W" Mahoney, and in others as William, "wm."

Q. Do you have in your office, Mr. McGrath, what is known as a personal record of the man. That is to say, a record showing his application for employment, physical examination, if any taken at the time of employment. A. We do not.

Q. Do you have any records showing the reason the man left your employ? A. No, sir.

NELS O. NELSON

being first duly sworn, testified as follows:

Direct Examination

By the Attorney, Mr. McGan:

Q. If you will, state your name please?

A. Nels O. Nelson.

Q. Where do you live, Mr. Nelson?

A. I live at 209½ First Street Southwest. This address here is not correct. That is southeast.

[273]

Q. What is your business, please, Mr. Nelson?

A. Meter, Electric Meter Department.

(Deposition of Nels O. Nelson.)

Q. Of the Northern States Power Company?

A. Electric meter and telephone.

Q. At Minot, North Dakota? A. Yes.

Q. How long have you been with the company, Mr. Nelson?

A. I went to work for them in 1907.

Q. You have worked for them continuously since then?

A. Yes, but here is something comes in. I was off in 1920. I happened to hear your dates on Mahoney. I was gone from the 15 of June that year until the 15 of October. I was out. That was 1920.

Q. Did you know William Mahoney?

A. I used to see him as a kid.

Q. You knew him?

A. I knew the Mahoney boys, sure, sure, I did.

Q. State whether or not William V. Mahoney was employed at the Northern States Power Company when you were there?

A. Oh, yes, he was there when I came back from Spokane in 1920.

Q. What was he doing at that time in his employment?

A. That is when he was working, some called the job of bell hop. You know, the man who takes the mail to the post office and does odd jobs for Hennessey, the assistant auditor, upstairs. He does all of them errands.

Q. Did you come in contact with Mr. Mahoney when he was employed there?

(Deposition of Nels O. Nelson.)

A. Oh, yes, sure, in this way, I saw him, joked with him. He had his work to do, but outside of that, I didn't have anything to do with him.

Q. State whether or not he had come to your department on errands?

A. Yes, he did come down and get orders, sure, and this stuff. [274] Get mail orders and meter orders.

Q. Were the packages he picked up, heavy packages? A. No, just light paper.

Q. For how long a period did this continue, Mr. Nelson?

A. I can't remember when he went. I don't remember.

Q. State whether or not you recall it was a considerable period of time Mr. Mahoney worked there?

A. That is hard to say. I know he worked there quite a while, but I couldn't say how long it was.

Q. Did you talk with Mr. Mahoney during this period? A. Yes, I talked with him.

Q. Did you notice his disposition?

A. Well, he never done me any harm. I get along with everybody anyway so far as I know.

Q. State whether or not his disposition was cheerful or not?

A. Well, just like the ordinary man would be, you know. Sometimes, you know, he might feel a little bit grouchy. I couldn't say anything out of the way on that. We always got along.

Q. Do you know whether or not he was particularly nervous?

(Deposition of Nels O. Nelson.)

A. No, I couldn't say as to that. He was just like an ordinary man to me. I couldn't say anything about that.

Q. State whether or not his conversation was intelligent?

A. Well, his conversation was all right so far as I noticed.

Q. State whether or not you noticed any signs of mental derangement?

A. The only thing I could say, we kind of would kid him a lot, you know, but I naturally do that with a bell hop anyway, you know. But, of course, I think it makes a difference too where you work for somebody. He didn't work for me. I had nothing about telling him what to do, or anything. I didn't have anything to do with that at all.

Q. State whether or not Mr. Mahoney seemed to take an interest in what he was doing down there?

A. Well, that is kind of a hard question to answer. [275]

Q. I will put it in another way, then. State whether or not, if you know, he gave satisfaction in his work.

A. Yes, sir, whatever he had to do to come and get there, I couldn't say anything against him. I couldn't notice but what he did his duties so far as getting orders and stuff down there.

Q. You have had other men in the same type of position since that time?

(Deposition of Nels O. Nelson.)

A. That is the way they start them out up there. They usually start them out as soon as somebody else quits at the office, or laid off, or stepped up, they get a chance to work on the books, or get a better job. I have seen dozens of them.

Q. You have seen dozens of them?

A. Yes.

Q. Can you compare the apparent efficiency of Mr. Mahoney with that of some of the others?

A. If you were going to say his physical defects, you could, but so far as outside of that, I couldn't say he was different from anybody else.

Q. Then Mr. Nelson, is it your opinion—state whether or not it is your opinion that he performed his duties there as well as the average boy in the job?

A. Upstairs that would be hard for me to tell, but downstairs any contacts I had with him, I couldn't say thing against him at all.

/s/ NELS O. NELSON.

BLANCHE CALLAHAN

being first duly sworn, testified as follows:

Direct Examination

By Mr. McGan:

Q. What your name, please?

A. Blanche Callahan.

Q. You reside in Minot, North Dakota?

A. Yes.

(Deposition of Blanche Callahan.)

Q. How long have you lived here? [276]

A. Well, I have been at the Northern States Power Company twenty-five years, I would say about twenty-seven years.

Q. Do you know William V. Mahoney?

A. I did.

Q. Did you work in the Northern States Power Company at the same time he did? A. I did.

Q. Do you remember how long he worked there, Miss Callahan?

A. A little better than a year, I think. I wouldn't say for sure. I looked at the sheets, but I can't remember now.

Q. State whether or not his work was in the same office you are? A. Yes, it was.

Q. What was his position?

A. Office boy and mail clerk.

Q. Did he do any office work?

A. No, not regular office work.

Q. State whether or not he ran an addressograph machine?

A. Yes, he ran an addressograph machine.

Q. Typewriter? A. No, not a typewriter.

Q. What was the purpose of running this addressograph machine?

A. To run off the electric, telephone, and telegraph bills, made up the blanks or orders.

Q. His other duties consisted of what, Miss Callahan?

A. Getting the mail and running miscellaneous errands.

(Deposition of Blanche Callahan.)

Q. State whether or not you always have a boy to do that work around?

A. Yes, we always have a boy to do that.

Q. Did you during this period come to know this Mr. Mahoney well?

A. Fairly well. As well as you do a person you are working with.

Q. State whether or not you noticed during this time any signs [277] of mental deficiency?

A. No, I did not.

Q. If you could observe his general efficiency in his job?

A. So far as I can remember, he did his work all right.

Q. You can state whether or not you know why Mr. Mahoney left?

A. He left to go west.

/s/ BLANCHE CALLAHAN.

Mr. Meindl: Your Honor, I think the record should show the appearance there, that the plaintiff was not represented to take the deposition.

Mr. McGan: The defendant now offers to read in evidence—is there something before the Court?

The Court: There is nothing before me. He wanted to suggest that he wasn't at the taking of the depositions. I don't know what difference it makes. It is now twelve o'clock. We will suspend. Ladies and Gentlemen, you will observe the former instructions, and return here at two o'clock this afternoon.

(Thereupon at 12:00 o'clock noon, December 11, 1942 a recess was taken until 2:00 o'clock P. M. of the same date.)

Portland, Oregon,
December 11, 1942,
2:00 P. M.
(After recess.)

The Court: You may proceed.

Mr. McGan: If the Court please, the defendant now offers in evidence Exhibit No. 8—Pre-Trial Exhibit No. 8, the deposition of George Dunlap, the deposition of James E. Mahoney, [278] that portion which has not been read by the attorney for the plaintiff, and the deposition of Francis Patrick Mahoney, that portion that has not been read.

The Court: Proceed.

Mr. McGan: I also offer to introduce in evidence at this time Pre-Trial Exhibit No. 8-A, statement of James E. Mahoney.

Mr. Meindl: The same objections as are included in the deposition.

The Court: In view of the fact that part of this testimony has been read the balance of the deposition may be offered and may be received, and likewise the Court will now admit Exhibit 8-A. I will limit that purpose if you wish, but I am not going to do it unless you ask me to.

Mr. Meindl: Your Honor, we will stand on our objections as made to the deposition.

Mr. McGan: Deposition of Mr. George Dunlap——

The Court (Interrupting): Just a moment. I want to consider this.

Mr. McGan: Pardon me.

The Court: I will admit Exhibit 8-A for the purpose of impeachment insofar as it is inconsistent with the testimony which has been offered and read by the plaintiff.

Mr. McGan: Yes, your Honor. If the Court please, there is an objection that appears by Mr. Meindl. Shall I read it?

Mr. Meindl: The objections are waived, as I understand the deposition. [279]

(The deposition of George Dunlap and the parts of the deposition of James E. Mahoney, which were not previously read, Defendant's Pre-Trial Exhibit No. 8, were then read to the jury; said depositions, omitting all formal parts, are in words and figures as follows, to-wit:)

GEORGE DUNLAP,

being first duly sworn to testify the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination

By Mr. McGan:

Q. Will you state your name, please?

A. George Dunlap.

Q. And where do you live, Mr. Dunlap?

A. 2301 East Madison.

Q. Seattle, Washington? A. Yes, sir.

(Deposition of George Dunlap.)

Q. And how long have you lived there, Mr. Dunlap? A. About 24 years.

Q. Were you living there in 1922?

A. Yes, sir.

Q. Did you know Mr. William V. Mahoney?

A. Yes, sir.

Q. And when did you become acquainted with him?

A. Well, when he moved in there, I think on December 6th, 1922.

Q. He moved in where?

A. Into the apartment house, 2301 East Madison.

Q. He moved into that apartment house?

A. Yes, sir.

Q. And when was that?

A. December 6th, 1922. [280]

Q. And how long did he live there?

A. Probably about a year and seven months.

Q. Or until 1924, is that right?

A. Yes, sir.

Q. You never knew him before he came there?

A. No, sir.

Q. And have you seen him since?

A. No, I have not.

Q. What was his business, if you know?

A. He was going to school.

Q. Where?

A. At the University of Washington.

Q. Did you have occasion to talk with him once in awhile?

(Deposition of George Dunlap.)

A. Oh, I talked to him a little; not very much.

Q. Did you see him frequently around the place?

A. Oh, I would see him once in awhile.

Q. Did you talk to him occasionally, too?

A. Oh, yes, I have talked to him occasionally.

Q. State whether or not you noticed any peculiarities in his actions? A. No, I didn't.

Q. State whether or not he talked to you in an intelligent manner? A. Yes.

Q. (By Mr. McGan): Were you in his apartment?

A. Yes, I guess I have been in it; yes, I have been in it.

Q. State whether or not you ever observed him around his home? A. Well, no.

Q. You say he was going to school?

A. Yes, he was going to school, and if I had any occasion to go into the apartment or to do anything, I would go in there during the day. I do not remember only once or twice of being in the apartment. [281]

Q. You may state whether or not you know whether he was married at the time he lived in your apartment? A. Yes.

Q. Was Mrs. Mahoney living there, too?

A. Yes, sir.

Q. You may state whether or not he took an interest, an apparent interest, in his surroundings?

A. Why, yes, ordinarily he did. He was going to school from there.

(Deposition of George Dunlap.)

Q. You may state whether or not you noticed anything about him that would lead you to believe that he was mentally upset? A. No.

Q. Do you know whether or not he was ill at anytime during the period he lived at your house?

A. No, not that I know of.

Q. He was about the house every day, was he?

A. Yes, he was around there.

Q. (By Mr. McGan): You may state now, if you remember, how frequently you saw him around there?

A. Oh, that would be awfully hard to say. It has been so long ago that it is pretty hard to recall back that far.

Q. At that time, Mr. Dunlap, if you recall, you may state whether or not you were around the apartment all the time?

A. Yes, I was around there all the time.

Q. You were not employed there?

A. No. I was—my wife and I were running the place.

Q. You may state whether or not you observed his appearance?

A. Why he appeared just like anybody to me.

Q. Well, perhaps I can reframe the question. State whether or not he was neat in appearance?

A. Yes.

Q. Apparently clean about his person? [282]

A. Yes, he seemed to be.

Q. You may state, if you can, whether, in your opinion, he was sane or insane.

(Deposition of George Dunlap.)

Q. (By Mr. McGan): State whether, in your opinion, William V. Mahoney was sane during the period of time you knew him in 1922, '23, '24?

A. Yes.

Q. (By Mr. McGan): You said, "Yes." Now, what do you mean, Mr. Dunlap, by that?

A. He was sane, yes.

Mr. McGan: Very well. You may cross examine.

Cross Examination

By Mr. Meindl:

Q. Mr. Dunlap, how long did you run that apartment house?

A. Well, I have been there about 24 years.

Q. How many apartments are in it?

A. 23.

Q. How many tenants are there in the apartment house at the present time?

A. Well, there are two in most of the apartments. Well, there is one apartment that has four in; one, three; another one with the wife and husband and three kids; and another couple has a baby.

Q. Would that be between fifty and sixty tenants in the apartment house at the present time?

A. It would be around fifty, yes.

Q. Could you give us an estimate as to how many tenants have been in the apartment house since the year 1922?

A. No. No, I could not.

Q. Speak a little bit louder, please.

(Testimony of George Dunlap.)

A. No, I could not give you any estimate. They come and go. I would not have any idea.

Q. You mean they stay *while* and then leave, is that it? [283]

A. Yes. Oh, we have some families that have stayed there 15 or 16 years. One stayed there 20 years. There is a part of them that go in and out.

Q. Over the course of years there would be several hundred that have lived in that apartment house since 1922?

A. No, it would not be anything like that.

Q. Of course, you can't remember each and every person that has lived in your apartment house real well? A. Oh, yes, I can——

Q. (By Mr. Meindl): Now, you may answer, Mr. Dunlap.

A. Yes, I can remember most all of them.

Q. Could you tell us how they looked and what their names are; that is, of all the tenants that lived in the apartment house?

A. Oh, I don't know that I can recall all of them; I would not say that.

Q. How many floors are there in the apartment?

A. Three.

Q. Which apartment did Mr. Mahoney live in?

A. Apartment 4 on the lower floor.

Q. I believe you testified in direct examination that you saw him just once in awhile, is that it?

A. Yes, sir.

Q. Did you ever see him out at the school?

A. No. No, I never went out to the school.

(Deposition of George Dunlap.)

Q. All you know about the school was what someone told you, then?

A. Yes, and what he came in and told me he was going to school.

Q. From what Mr. Mahoney and other people told you, is that it? A. Yes.

Q. From your own knowledge, you don't know whether he went to school or not, then?

A. He said he was going; that is all I know.

[284]

Q. From your knowledge, however, not having seen him?

A. No, I never saw him there, no.

Q. You don't know how frequently he was absent or anything else, on that occasion?

A. No, that I would not know.

Q. You wouldn't know how he got along in school, either? A. No.

Q. Or what interest he had in the school?

A. No, I don't know.

Q. I believe you said you were in their apartment a couple of times—in the Mahoney apartment a couple of times that you can remember?

A. Yes. I think I was in there a time or two.

Q. Mr. Mahoney was not present at that time?

A. No. Sometimes I would go in and fix a faucet or something like that.

Q. I take it, Mr. Dunlap, you did not have much occasion to observe Mr. Mahoney? A. No.

Q. I believe you testified that you did not notice Mr. Mahoney very much?

(Deposition of George Dunlap.)

A. No. I saw him around. I did not pay much attention to him, no.

Q. The same as other tenants? A. Yes.

Q. As far as you know Mr. Mahoney may have been ill days or weeks at a time without you knowing about it?

A. Oh, he could have been, yes.

Q. You are not a doctor, are you, by *an* chance, Mr. Dunlap? A. No, sir.

Q. In giving an opinion as to a man's mental condition, you are just basing it upon what you observed?

A. My own opinion, yes, but I have noticed him.

Q. As far as you know, he may have been upset without your [285] seeing him?

A. He could have been. As far as I could see, why, he appeared to be all right.

Q. I suppose after all these years it is a little bit difficult to remember all these facts definitely?

A. Oh, yes, it is.

Mr. Meindl: That is all.

Redirect Examination

By Mr. McGan:

Q. Mr. Dunlap, you stated in your cross examination that Mr. Mahoney lived on the lower floor in Apartment No. 4? A. Yes.

Q. And in relation to your own apartment number, where is that situated?

(Deposition of George Dunlap.)

A. Well, I was in apartment 8 on the second floor at that time. Now, I am in apartment No. 12 on the second floor.

Q. And you did not live on the same floor with Mr. Mahoney? A. No.

Q. Mr. Dunlap, you stated that Mr. Mahoney talked to you about his schooling.

A. Well, he told me that he was going to school. That is about all. He said the government was sending him to school.

Q. Did he tell you that he was going to school all the time that he was in the apartment house?

A. No, he never told me that he was going, of course,——

Mr. McGan: That is all.

Mr. Meindl: That is all. [286]

JAMES EDWARD MAHONEY,

was duly sworn to testify the truth, the whole truth, and nothing but/ the truth, testified as follows:

Direct Examination

By Mr. McGan:

Q. Will you state your name?

A. James Edward Mahoney.

Q. Where do you reside, Mr. Mahoney?

A. 124 Warren Avenue.

(Deposition of James Edward Mahoney.)

Q. Is that Seattle, Washington?

A. Seattle, Washington.

Q. How long have you lived in Seattle, Mr. Mahoney?

A. Off and on since '37. That is, I first lived here in 1937.

Q. Are you acquainted with William V. Mahoney? A. Yes, sir.

Q. Is he any relative of yours?

A. A brother.

Q. He is your brother?

A. My brother, yes.

Q. Do you recollect the time when your brother was discharged from the service?

A. Yes, I do.

Q. Where were you residing at that time?

A. Minot, North Dakota.

Q. How long after that did you reside in Minot?

A. About two years.

Q. Was Mr. William V. Mahoney around Minot all that time?

A. After he was discharged, not all of that time, I do not believe. No, he wasn't there the entire time that I was, because he left before I did.

Q. State, if you know, where William went from Minot?

A. He came to Seattle to attend school.

Q. Did you live at the same place your brother did in Minot? [287] A. At which time?

Q. In 1922? A. In 1922, no.

Q. Or before that?

(Deposition of James Edward Mahoney.)

A. I did when he was home on the furlough.

Q. But when he came home when he was finally discharged, did you live at the same place he did?

A. No.

Q. State why that was?

A. He was married and lived in an apartment, I believe, at the time.

Q. He was not living at the family home?

A. Our family home was broken up at the time, and I lived in an apartment house.

Q. How frequently did you see your brother during this first period?

A. During the furlough?

Q. No, during the first period after the discharge?

A. Oh, I would see him two or three times a month, maybe oftener.

Q. Did you visit in his home occasionally?

A. No, not other than just to go to see him about something.

Q. State what you noticed, if anything, about his mental condition at that time.

A. Well, from what I would observe, it was—at that time, I would say that it was due to the stress that he was in.

Q. Now, will you just state what you noticed?

A. Well, he was irritable and very nervous and very quarrelsome, I would say.

Q. Did he get out of patience with you, Mr. Mahoney? A. Yes, he did with me.

(Deposition of James Edward Mahoney.)

Q. And did that ever occur before he went in the Army?

A. Not—no, I would not say that it occurred to the same [288] effect, other than just a little family quarrel then; but occasionally. But after he got out, why, he was hard to get along with, I would say.

Q. Do you know whether or not he was employed during that period of time?

A. He was employed at the Northern States Power, I believe is the name.

Q. Did you ever see him at his work?

A. No, I have never seen him at his work.

Q. Did you see him on the street? A. Yes.

Q. How was his appearance?

A. His appearance was neat.

Q. Was he neat about his person?

A. Yes, he was.

Q. How about his conversation, if you noticed anything about that?

A. It was rambling, I would say.

Q. Will you just state for the record what you mean by that?

A. I mean that he would not talk on one subject. He would ask a question. Perhaps before you would answer the question, he would ask you another one on something else.

Q. State, if you can, whether you observed that there were other times when he would not do that?

A. Well, I don't believe there was. He was al-

(Deposition of James Edward Mahoney.)

ways—he always seemed to be the same, practically the same.

Q. How old was your brother William at that time? A. I would say about 24.

Q. State whether or not you formed an opinion as to whether your brother's condition was normal or abnormal at that time?

A. I had really never formed the opinion at that time, [289] whether he was or not.

Q. Have you formed an opinion since?

A. No, I really haven't.

Q. You do not have any opinion on that?

A. No, I haven't seen him recently.

Q. State whether or not, if you know, your brother was in any trouble with the law?

A. Not to my knowledge.

Q. Or any other kind of trouble that you know of? A. He got into a lots of quarrels

Q. But aside from the quarrels?

A. Well, he would get into a little fight occasionally.

Q. But aside from that?

A. That is all. Nothing that I know of.

Q. Now, when did you see your brother next, Mr. Mahoney, after he left Minot?

A. The next time I saw him was in about 1923.

Q. Where was that?

A. In Portland, Oregon.

Q. And how did that happen?

A. I was living there at the time.

Q. Did he come to visit you?

(Deposition of James Edward Mahoney.)

A. No. He just came down to—I don't know for what purpose he came down from Seattle. Maybe some day he would stay a day and maybe he would stay longer.

Q. He came several times, did he?

A. Yes, he came down several times.

Q. Did you observe his mental condition at that time, Mr. Mahoney?

A. Yes, I observed it—that he was practically the same in 1920.

Q. When did you last see him?

A. The next time I saw him in 1927, I believe was the year.

Q. And where? [290]

A. At Devil's Lake, North Dakota.

Q. Was he living there then?

A. No, he was living in Portland.

Q. How did he happen to come to Devil's Lake?

A. He came down there to visit me for a couple of days.

Q. Did he come alone?

A. Yes, he was alone.

Q. Do you know how he got there?

A. I believe he came on the train.

Q. Did you talk with him at that time?

A. Yes, I talked with him.

Q. State whether or not you noticed any change in his condition then?

A. No. I think he was the same as he was in 1922, practically.

Q. And when was the last time you saw him?

(Deposition of James Edward Mahoney.)

A. In 1937.

Q. And where did that occur?

A. On the street in Portland, Oregon.

Q. How long did you talk to him?

A. About five minutes.

Q. You hardly had an opportunity to observe his condition then? A. No, I didn't.

Q. But you were interviewed, were you not, by a special agent for the Federal Bureau of Investigation with reference to this matter?

A. Yes, I was.

Q. When was that, Mr. Mahoney?

A. About three weeks ago.

Q. That would make it about the 26th day of May, wouldn't it, Mr. Mahoney?

A. Approximately, yes.

Q. Now, state whether or not—— [291]

Mr. McGan: I will ask that this he marked as an exhibit.

(A letter, dated Seattle, Washington, May 26, 1942, signed James E. Mahoney, was marked Defendant's Exhibit No. 1.)

Q. (By Mr. McGan) Mr. Mahoney, I will hand you what has been marked as Defendant's Exhibit No. 1 for identification, which consists of two pages in handwritten matter, in longhand, and ask you whose signature appears on the second page.

Mr. Meindl: Just a moment, before you answer. I object to these proceedings not being proper, and on the further ground that they are irrelevant and

(Deposition of James Edward Mahoney.)

immaterial and an attempt to impeach his own witness.

Q. (By Mr. McGan) Is that your signature appearing on that second page? A. Yes, it is.

Q. Is that a paper that you made to the Federal Bureau of Investigation?

A. This is the statement that he wrote out.

Q. That you signed?

A. I signed it for him.

Q. And you read that over before you signed it?

A. Yes, I read it over.

Mr. Meindl: Let the record show my objection. The plaintiff objects to Defendant's identified Exhibit No. 1 upon the ground that it is not a proper document for the purpose of refreshing recollections; that it is not made at a time when the matter sought to be elicited occurred, or even in close proximity thereto; further, the only possible use that said document could be used for would be for impeachment purposes, and there has not been any foundation laid for said purpose, and, further, the witness is the Government's own witness. [292]

Q. (By Mr. McGan) I will ask you, Mr. Mahoney, if you have an opinion now as to whether your brother was sane or insane at the time he was home, right after his discharge from the Army.

Mr. Meindl: I object to the question upon the ground that the question has been asked once, and the witness testified that he had no opinion.

A. I have formed no opinion.

Mr. McGan: You may cross examine. [293]

Mr. Meindl: Now I ask the Court to be permitted to read into evidence this statement, Exhibit 8-A.

Mr. Meindl: Our same objection, your Honor. It is not inconsistent with the cross-examination. We reserve our same objection.

The Court: If it is not inconsistent with the cross-examination I will not permit you to read it.

Mr. McGan: There are statements here that are not inconsistent, your Honor, and there are statements that are inconsistent.

The Court: The way that this is offered, the Court must necessarily treat the cross-examination as the direct, it being offered by you now. Counsel for the defendant has a right to read the written statement which is conflicting therewith, not for the purpose of giving evidence of the facts which are in the written statement, but to show the credibility the jury should give to the witness, and on that basis if there are inconsistent statements I will permit you to read it, although I will not permit it to go in evidence. It will stand on the same basis as the other testimony in the deposition. Ladies and Gentlemen, this which is about to be read is a written statement of the same witness. You are not to take this as evidence of the facts contained in the deposition, but you may consider it in determining the credibility that you should give this witness. [294]

(The written statement, signed by James E. Mahoney, Defendant's Pre-trial exhibit No.

8-A, was then read to the jury by Mr. McGan; said statement is in words and figures as follows, to-wit:)

DEFENDANT'S PRE-TRIAL EXHIBIT

No. 8-A

Seattle, Washington
May 26, 1942

I, James E. Mahoney, make the following voluntary statement to Fred R. Elledge whom I know to be a Special Agent of the Federal Bureau of Investigation. No threats or promises of reward have been made and I make this statement freely knowing that I do not have to make the same.

I moved to Portland, Oregon in May, 1922, when I resided until January 1924. During this time my brother, William V. Mahoney was in attendance at school in Portland and Seattle. I saw him every two to three months at which time I talked to him. His mental condition at this time was apparently normal with the exception of traces of irritability and nervousness and jumping from one subject to another in his conversation.

I returned to Devil's Lake, North Dakota upon leaving Portland and while residing in the Baird Block in Devil's Lake I was visited by my brother William during the summer or early fall of 1927. He stated at this time that he had made a trip to Minot, North Dakota and made the trip to Devil's Lake to see me. He stated that he had made the

trip alone and his wife was in Portland, Oregon. William stayed at a hotel in Devil's Lake and I visited with him on two different evenings. His mental condition at this time was about the same as when I last saw him in 1924. He displayed signs of nervousness and except for jumping from one subject to another his conversation appeared rational and normal.

I did not see nor hear from William again until 1937 when I saw him for about 15 minutes on the street in Portland, Oregon. My contact with him at this time was so brief I could form no accurate opinion as to his mental ocndition.

I have read the above statement consisting of one page beside this one and the same is true to the best of my knowledge and I have initialed the first page and signed my name to this one.

Signed JAMES E. MAHONEY

Witnesses

Fred R. Elledge,
Special Agent F.B.I.
508 N. S. Court House Bldg.,
Seattle, Wash.

Edgar L. Robbins,
Special Agent F.B.I.
Seattle, Washington [295]

Mr. Dillon: Call Mrs. Peter Swanson.

MRS. P. SWANSON

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Will you please state your name again?

A. Mrs. Peter Swanson.

Q. And where do you reside?

A. At 2202 Northeast Flint.

Q. Do you know William V. Mahoney?

A. Yes, sir.

Q. For what period of time have you known him? A. Since 1922.

Q. When you first met him in 1922 what was he then doing to the best of your recollection?

Q. Not a thing.

Q. Did he work at any time while you knew him there in 1922 and '23? A. No.

Q. And how long have you known him since 1922? Until the present time? A. Yes, sir.

Q. And how closely were you associated with him between 1922 and 1930, say? How often have you seen him?

A. Well, quite often. Part of the time he lived with me.

Q. What years did he live with you?

A. I can't say exactly.

Q. To the best of your recollection?

A. From about '24, I should judge, to some time in '30.

(Testimony of Mrs. P. Swanson.)

Q. During that time did you notice that he drank excessively of alcohol?

Mr. Bynon: That is objected to as leading and improper. [296]

A. At some times.

Mr. Bynon: Wait a minute—pardon me.

The Court: She has answered. I will allow the answer to remain.

The Witness: At some times.

Q. (By Mr. Dillon) How often?

A. I couldn't say.

Q. What is the best of your recollection?

A. I just can't say.

Q. Did he drink heavily?

Mr. Meindl: If your Honor please, we object to that as leading.

The Court: Sustained.

Q. (By Mr. Dillon) Can you recall at this time the extent of his drinking? A. No.

Mr. Dillon: If your Honor please, the Government is taken by surprise with this witness. I would like to have her identify her signature to a statement she made on June 17, 1942, and ask her concerning it.

The Court: Yes.

Mr. Dillon: May I have it identified as a Government's Exhibit?

The Court: Is this a pre-trial exhibit?

Mr. Dillon: No, your Honor, it is for the purpose of impeaching the witness.

Mr. Bynon: I object to it, your Honor.

(Testimony of Mrs. P. Swanson.)

Mr. Dillon: As I say, we were taken by surprise and there was no occasion of it on pre-trial because we had the statement of the witness and thought she would testify according to it.

The Court: It won't be received in evidence if it is not offered at pre-trial.

Mr. Dillon: But, your Honor, wouldn't it come under the [297] exception?

The Court: No.

Mr. Dillon: If the Government is taken by surprise and had no reason to anticipate such a contingency would we not be able to use it?

The Court: No, the theory is that you are not to keep any cards up your sleeve; you are supposed to display at pre-trial all documents that you had that might be used at the trial.

Mr. Dillon: I appreciate that, your Honor, but usually with your own witness you wouldn't put any statement in because you would expect them to testify in keeping with the statements they had made. It wouldn't be holding anything back or anything like that. It is completely at variance with the statement she gave in May, 1942.

The Court: The Court has ruled, and the last remarks are stricken from the record. Don't try to tell this jury what is in that statement.

Mr. Dillon: I said nothing about what is in the statement, your Honor.

The Court: Take your exception and proceed.

Mr. Dillon: May I make an offer of proof, your Honor?

(Testimony of Mrs. P. Swanson.)

The Court: Yes. Not in the presence of the jury. Keep it until we take a recess, and you can make any offer you want to.

Q. (By Mr. Dillon) When you saw Mr. Mahoney during this time did he act and appear to you as a normal person?

A. As a rule he did.

Mr. Dillon: That will be all.

Mr. Meindl: No cross-examination.

The Court: That is all.

(Witness excused.) [298]

EDGAR E. WILLIAMS

was thereupon produced as a witness in behalf of the defendant herein, and, being first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Please state your name again, sir.

A. Edgar E. Williams.

Q. Where do you reside?

A. At 76 Northeast Russell.

Q. During the years 1929 to 1931 where did you reside? A. 2337 Southwest Sixth.

Q. And were you in business at that time?

A. Yes, sir.

Q. In what type of business?

A. Grocery, lunch, and delicatessen.

(Testimony of Edgar E. Williams.)

Q. During that period did you become acquainted with one William Mahoney?

A. Yes, sir.

Q. And did you have occasion to see him during that period? A. Yes, sir.

Q. At the time that you saw him and observed him did you note anything mentally wrong or abnormal about him? A. No, sir.

Q. On all occasions? A. On all occasions.

Mr. Dillon: That is all.

Mr. Meindl: No cross-examination.

(Witness excused.) [299]

CREON G. FERRY

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. What is your occupation, Mr. Ferry?

A. Detective in the Portland Police Department.

Q. Do you know one William V. Mahoney?

A. Yes, sir, I do.

Q. How long have you known him?

A. Oh, I think I first met him around 1927 or '8.

Q. In the years 1927, '28, '29, '30, '31, '32, '33, and '34 did you have occasion to see Mr. Mahoney intoxicated?

(Testimony of Creon G. Ferry.)

A. Well, under certain conditions he probably had more to drink than he should have. I have talked to him when he would be in that condition. Normally he could navigate or go home, but I mean I said Hello and talked to him.

Q. How many times approximately would you say you have seen him in that condition during those years?

A. Oh, possibly I have talked to him and met him in some tavern in the south and during those years possibly on an average of two or three times a month, contacted and saw him on the street.

Mr. Dillon: That is all. Thank you.

Cross-Examination

By Mr. Bynon:

Q. Mr. Ferry, you do not intimate by your presence here that you have ever known Mr. Mahoney as a law breaker, do you, or anything like that?

A. No, I never had any occasion to investigate him on any crimes.

Q. And you have been a member of the Portland police force for many years, have you not? [300]

A. 1912.

Q. I suppose perhaps you know Mr. Mahoney like you do many others. A. That is right.

Q. Like you know me, for example?

A. Yes, sir.

Q. And many other of your acquaintances?

A. Yes.

Q. Did you ever know Mr. Mahoney well

(Testimony of Creon G. Ferry.)

enough to know that he had his back broken while he was in the Army in France?

A. No, I never talked to him about any of his service in the Army. He has talked to me a good many times about things that were happening at the time or during that period of time, but not what he had been through while he was in the service.

Q. I just wanted to clear up one thing, Mr. Ferry. You do not mean to imply by your testimony, do you, that you ever had any trouble with Mr. Mahoney?

A. No, I never had any trouble with him. I don't mean that.

Q. One last thing, Mr. Ferry. Do I understand you to testify that you saw him sometimes two or three times a month? Was that your testimony?

A. Yes, I saw him on that average sometimes, sometimes more than that, that is, not every month, but some months I might have saw him on the average of every day, and maybe I wouldn't see him again for three or four months. It all depends if I was in that particular locality or district.

Q. I take it that you have no particular reason to remember when or where you saw him.

A. Oh, no, no reason for that.

Q. You testified that on occasions you saw him when he had something to drink?

A. Yes, sir.

Q. Now is it true that you saw him many times when he didn't [301] have anything to drink as far as you could tell?

(Testimony of Creon G. Ferry.)

A. Yes, I saw him many times when he didn't have anything to drink. Well, he was all cleaned up and dressed up, and he was most all the time whether he was drinking or not.

Mr. Bynon: That is all.

Mr. Dillon: That is all. Thank you.

(Witness excused.) [302]

E. HAGLAND

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Will you please state your position?

A. Sir?

Q. What is your work?

A. Police officer.

Q. Any special type?

A. Wagon driver down there at Second and Oak, partol wagon driver.

Q. Do you know one William Mahoney?

A. Yes, sir.

Q. In the years 1934 to the present time would you be able to approximate the number of times that you have arrested Mr. Mahoney for intoxication and disturbance of the peace and driven him to the station?

(Testimony of E. Hagland.)

A. Well, I wouldn't say that I arrested the person myself, but I have seen him about half a dozen times that I contacted and saw him, and better.

Mr. Dillon: That is all. Thank you.

Cross-Examination

By Mr. Bynon:

Q. Mr. Hagland, have you had experience and training in distinguishing epilepsy from other types of——

A. (Interrupting): I have seen a few cases.

Q. Do you recall having seen Mr. Mahoney in an epileptic seizure or in the aftermath of one?

A. Well, he has been in pretty bad shape a few times down there. I couldn't tell much what it was.

Q. You didn't know whether it was epilepsy or not?

A. Well, he had been drinking. [307]

Q. Mr. Hagland, I want you, please, to answer my question. Are you able to tell this jury whether or not——

A. (Interrupting): Yes, I can tell the difference between a drunken man and an epileptic. I have seen both.

Q. Well, I will ask you again whether or not on any of these occasions, these half a dozen times you have testified to, Mr. Mahoney was suffering from an epileptic seizure or the residual or aftermath of epilepsy?

A. No, he wasn't epileptic when we took him in, because we leave that to ambulances, cases like that.

(Testimony of E. Hagland.)

Q. You are the driver, aren't you?

A. Driver and back end both; we change off.

Q. Are you aware that Mr. Mahoney has those epileptic seizures?

A. I have heard it, yes. I have heard him telling it to us down there.

Mr. Bynon: That is all.

Mr. Dillon: That is all, Officer. Thank you.

(Witness excused.) [308]

M. REKDAHL

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Officer, what work do you do?

A. What is it?

Q. What work do you do?

A. I drive the police patrol.

Q. Do you know one William Mahoney?

A. Yes.

Q. From the year 1934 up to this year how many times approximately would you say that you picked up Mr. Mahoney for disturbing the peace and drove him to the jail?

A. Well, it would be awful hard to say the exact number of times. We hauled him I suppose in the

(Testimony of M. Rekdahl.)

last seven years or so about ten times anyway; around that, ten or twelve times, maybe. I have no record of that.

Mr. Dillon: That is all. Thank you.

Cross-Examination

By Mr. Bynon:

Q. Mr. Rekdahl, did you know that in this first year Mr. Dillon mentioned, 1934——

A. (Interrupting): I can't hear you.

Q. Did you hear me? You shook your head.

A. I couldn't hear you.

Q. I will speak louder. I want to ask you this question, Mr. Rekdahl: Did you know that in 1934 Mr. Mahoney here was committed to the Oregon State Hospital for the insane?

A. No, I didn't know that.

Q. Did you know that Mr. Mahoney had epileptic seizures? A. What?

Q. Do you have trouble with your hearing, Mr. Rekdahl? [309] A. Yes, I have.

The Court: You may approach if you wish, Counsel.

Mr. Bynon: If your Honor will permit me I think I can make myself heard.

Q. Do you know now, Mr. Rekdahl, that Mr. Mahoney suffers from epileptic seizures?

A. I don't know that he does. I have heard he has, but I never saw him have one, so I wouldn't know.

Mr. Bynon: I think that is all.

(Testimony of M. Rekdahl.)

Mr. Dillon: That is all. Thank you.

(Witness excused.) [310]

CLARK BAILEY

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. What is your business, Mr. Bailey?

A. I have an ice cream shop in Beaverton, Oregon.

Q. And where are you located?

A. Beaverton, Oregon.

Q. Do you know one William Mahoney?

A. Yes, sir.

Q. When did you first meet him?

A. Oh, about 1928, I guess it was. I don't remember exactly.

Q. At the time you met him in 1928 did you note anything from his physical appearance or actions that were abnormal?

A. No, I don't think so. I heard that he had sort of seizures of some kind.

Mr. Dillon: Well, I want to ask that that be stricken, because we know he did.

Q. Did you ever see him in a condition of insobriety, that is, not sober?

A. Yes, I guess I have.

(Testimony of Clark Bailey.)

Q. And in that condition what was his behavior?

A. Well, he might have been a little bit loud at times, or belligerent, I would say.

Mr. Dillon: That is all. Thank you.

Mr. Bynon: No cross-examination.

(Witness excused.) [311]

A. J. McCAMMEL

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. What is your profession, Doctor?

A. Practice of medicine and surgery?

Mr. Bynon: We will admit the Doctor's qualifications, general qualifications.

Q. (By Mr. Dillon): Doctor, I will hand you through the bailiff Pre-Trial Exhibit 1 marked for the defendant and introduced by plaintiff, calling your attention to the examinations of April 9, 1921 and August 18, 1921, and ask you if that is your signature attached to those examinations?

A. Yes, that is my signature.

Q. Doctor, have you any independent recollection of one William Mahoney?

A. No, I have not.

Q. And what are those two papers that I have called your attention to?

(Testimony of A. J. McCammel.)

A. They are copies of—or rather reports of examination.

Q. Medical examinations?

A. Medical examinations that I made for the Bureau of War Risk Insurance of the United States Public Health Service, the Federal Board for Vocational Training.

Q. You didn't mean the Bureau of War Risk Insurance? What does it state on top?

A. It states on top "U. S. Public Health Service, Bureau of War Risk Insurance, Federal Board for Vocational Training."

Q. My fault. Using the first examination to refresh your memory, will you state of what your examination consisted and what were your findings?

A. It was a general examination, and my findings were: The [312] first lower right molar missing. Some teeth decayed. Varicose veins, slight bilateral. Chest negative. Scar 8½ inches long over spine in the lower dorsal and lumbar region. Stiffness of spine. X-ray of spine shows slight displacement between the 11th and 12th dorsal vertebra and fracture of 12th dorsal and 1st and 2nd lumbar vertebra.

Q. And what was your diagnosis, Doctor?

A. Diagnosis: Fracture of vertebra simple, 12th dorsal, 1st and 2nd lumbar. Dislocation of vertebra, 12th.

Q. Would you explain as briefly as you can in language that we laymen could understand just

(Testimony of A. J. McCammel.)

what those findings consisted of and the interpretation of your diagnosis?

A. Well, that he had had a fracture low down in the back between the 12th dorsal—the 12th dorsal vertebra was fractured—that is the one that carries the last rib, and then the 1st and 2nd lumbar vertebra, the two directly below that. He had had a fracture of those which had apparently healed with a slight displacement between the 11th and 12th dorsal vertebrae.

Q. At that time, Doctor, did you make any nervous or mental examination?

A. Yes, I looked him over, gave him a general looking over, and reported just what I found that was abnormal.

Q. And was there anything there to that effect?

A. No.

Q. Doctor, basing your opinion as a physician and on the findings of your report of that date—will you state the date again, please?

A. The date this——

Q. (Interrupting): At the top, is it not?

A. Yes, it is at the top. April 9, 1921.

Q. On April 9, 1921 would Mr. Mahoney without injury to himself or to his health have been able to carry on the occupation of a clerk? [313]

A. Yes.

Q. A meter reader? A. Yes.

Q. A janitor? A. Yes.

Q. If qualified, a bookkeeper and accountant?

A. He would be able to perform any light work.

(Testimony of A. J. McCammel.)

Q. You mean by that mainly sedentary work?

A. Not entirely sedentary, but where there was not too much heavy lifting or exertion.

Q. Doctor, will you turn to your next examination? What is the date of that?

A. August 18, 1921.

Q. And was there any difference in your findings or diagnosis as compared to the previous examination in April?

A. I don't see any difference. The only difference I see in the report is, in the April report I had made this note at the bottom of it: "This man's condition is improving and with vocational training should be able to handle any clerical or similar work." There is nothing about that on the other. Otherwise the examination and the diagnosis are practically the same.

Q. And at that time in August he could have carried on without injury to himself or his health the same occupations that I narrated to you in reference to the previous examination? A. Yes.

Q. And was your examination of the nervous and mental the same character as the previous?

A. Yes.

Mr. Dillon: You may cross-examine.

Cross-Examination

By Mr. Bynon:

Q. Doctor, where are you living, please? [314]

A. Chiloquin, Oregon.

Q. That is down in Klamath County?

A. Yes.

(Testimony of A. J. McCammel.)

Q. How long have you been there?

A. I have been there about nine months.

Q. Are you employed by the Government?

A. Part time.

Q. Were you employed by the Government at any previous time before going to Chiloquin?

A. Yes.

Q. In what capacity were you employed by the Government?

A. I was in the United States Army Medical Service during the World War, and at the time that I made this examination I was employed part time by the Public Health Service, which was afterwards the Veterans Bureau.

Q. Where were you living at that time?

A. At Minot, North Dakota.

Q. Were you engaged in general practice there?

A. Yes.

Q. Do you specialize in any branch?

A. No, I did general practice.

Q. You were not specializing at that time in any particular field? A. No.

Q. This examination, I take it, was made with anticipation that Mr. Mahoney would go into some vocational training by the Government, was it not?

A. That I believe was the object of the examination.

Q. Well, that is why he came to you to be examined, wasn't it, Doctor? That was a condition precedent to his going into vocational training under the Government?

(Testimony of A. J. McCammel.)

A. I can't say as to that. I would get a request for an examination and I would make the examination and send it in to [315] the Government. I was examining them for treatment; I was also treating them, some of these returned soldiers, keeping them in the hospital there at Minot and treating them, so that I was examining them for all these different things.

Q. Well, I remember you called Mr. Dillon's attention to the fact that this report which was just before you was for the Federal Board of Vocational Education, so I assumed that you examined him as a step preparatory to going into some kind of vocational training.

A. I believe that is what he was sent in for.

Q. And you took this history yourself, I assume, which appears here about his long period of hospitalization? A. Yes.

Q. You knew he had had these fractures of his spinal column?

A. Yes, I knew from his history.

Q. That laminectomy performed that you spoke of*f*, what is that, Doctor?

A. That is an operation on the spine. There are arches that go around and enclose the spinal cord. Those are the laminae, and part of that was cut out, I presume to straighten his spine.

Q. Is that the reason why you found that scar in his back?

A. That was the scar of that operation, yes. He had been operated on.

(Testimony of A. J. McCammel.)

Q. Yes, I understand it. You say his back is still stiff and he is unable to work?

A. I believe that is his history as he gave it to me.

Q. Doctor, at that time you were not doing any neuropsychiatry, were you? A. I was not.

Q. I notice this form that you had before you says, "For neuropsychiatric examination see paragraph 11F", and no neuropsychiatric examination was made, was it?

A. Just the general examination. [316]

Q. Well, to be perfectly frank, Doctor, you don't want this jury to believe that you made any neuropsychiatric examination of him at that time, do you? A. No, I do not.

Q. Thank you. I take it that your answers to my questions respecting the first examination are the same as you would make if I put like questions to you respecting the second examination made a few months later.

A. The conditions seemed about the same in both examinations, as I remember.

Q. And your examinations of him were the same, I take it, Doctor? A. Yes.

Q. May I ask you too if this second examination was made for the same purpose, the Federal Board of Vocational Education?

A. I believe it is on the same blank, and so far as I know was made for the same purpose.

Q. You have no independent recollection of Mr. Mahoney, as I remember your testimony.

(Testimony of A. J. McCammel.)

A. I have not.

Q. In other words you wouldn't know if this was the same man as you examined or not?

A. I couldn't say. It was over twenty years ago.

Mr. Bynon: That is all.

Redirect Examination

By Mr. Dillon:

Q. Doctor, counsel has drawn your attention to the fact that no neuropsychiatric examination was made. If there had been any abnormalties, nervous or mental, observed by you during your examination then you would have recommended a neuropsychiatric examination? Is that not correct?

A. I would.

Mr. Dillon: That is all.

(Witness excused.) [317]

G. I. BIRCHFIELD

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Dillon:

Q. Will you please state your profession, Doctor? A. Beg pardon?

Q. What is your profession?

A. Physician and surgeon.

Q. What school are you a graduate of?

(Testimony of G. I. Birchfield.)

A. St. Louis University.

Q. What year? A. 1916.

Q. Have you practiced your profession since that time? A. Yes, sir.

Q. Where are you now located?

A. Seattle, Washington.

Q. In January 1924 where were you located?

A. Seattle, Washington.

Q. Doctor, I will ask the bailiff to hand to you part of the physical examination of William Mahoney made January 18, 1924, which is part of Defendant's Pre-Trial Exhibit No. 1 introduced by plaintiff. Calling your attention to Page 2 of that examination I would ask you if that is your signature attached thereto.

A. Yes, sir, that is my signature.

Q. Do you have any independent recollection of Mr. Mahoney, Doctor? A. No, I do not.

Q. Then using that examination report to refresh your memory, will you state of what the examination consisted and what your findings were?

A. Well, this examination, I can tell you very directly, was [318] the beginning in 1924 of these examinations. These examinations were made to determine the disability of the men, and three men were put on them. I happened to be the chairman of this board. They were to make a thorough examination so that everybody could be checked up thoroughly and not leave anything undone.

Q. There were two other doctors to that board?

A. There were, yes, sir.

(Testimony of G. I. Birchfield.)

Q. Their signatures are attached thereto?

A. They are.

Q. Would you please state who they are?

A. R. T. Hopkins and A. C. Feaman. That is their signature; I could swear to that, I have seen them so many times.

Q. Then would you state, Doctor, what your findings were?

A. Do you want the full physical examination or not?

Q. Well, the important findings, Doctor. You might give them briefly.

A. The first thing we asked this man was his present complaint, and his present complaint was the stiffness and weakness in his dorsal spine. "I am unable to do any lifting or hard work." We asked this question so that we could have something definite to make an examination on. In our examination then we found a fairly well nourished male. His color was good. His weight was 134 pounds, and he was 70½ inches tall. His temperature was normal, his pulse was normal, his scalp and skull were normal, his eyes, ears, nose and throat were apparently normal. His teeth were referred to the dental section because he had some decayed teeth and we did not make an examination of those things. Further examination showed that his neck was normal, his chest was normal, the heart and lungs were both found normal. Blood pressure was normal. There was no venereal diseaase found or any indication of it. Then we went

(Testimony of G. I. Birchfield.)

further and made an examination of the extremities, bones, and joints. In this examination we found a scar on the back extending from the tenth [319] dorsal spine along the right spinal border to the upper margin of the sacrum, 8¼ inches long, due to an operation following a fracture of spine. Then the condition of the spine—we found there a kyphosis—that is a bending of the spine—involving the 10th, the 11th, and the 12th dorsal vertebrae.

Q. Doctor, if I may interrupt, as you go along and meet those technical expressions would you be good enough to explain them?

A. To repeat them?

Q. No, explain what they are.

A. The 10th, 11th, and 12th dorsal spines—that is the middle of the spine, the middle of the individual, not the upper part but in the middle of the back. There is the dorsal spine and the lumbar spine. This involves the vertebrae in the lower portion of the main part of the spine, also the 1st and 2nd lumbar. There was a slight scoliosis in the same region. That means a turning to the side. Kyphosis is this (indicating); scoliosis means to the side. There is no motion in this part of the spine in any direction. There is tenderness to pressure over this region. The muscles over the lumbo-dorsal spine—that is the lumbar and the dorsal region of the back—are atrophic. That means that they don't have much motion to them, they are stiff and don't feel soft and respond to action, like

(Testimony of G. I. Birchfield.)

you put your finder on a violin string that you could feel the motion or the tenseness of it. He has a drooping of the right shoulder. That is the extent of our examination, with the exception of the X-rays. The X-rays show the lower dorsal and lumbar spine, which were read by Dr. Hopkins, a member of the board. It shows an old injury to the 12th dorsal and the 1st, 2nd, and 3rd, lumbar vertebrae. The articular surface between the 12th dorsal and the 1st lumbar is somewhat irregular and indistinct. The intervertebral disk—that is the spaces between each spine—is *narrowed* and [320] there is some lipping of the right upper border of the 1st lumbar—that means that the bone is lipped over a little bit—and absorption on the right upper angle. The 1st and 2nd lumbar vertebrae are practically fused. That means they are as one; they are stiff. That is about all there is with the exception of what I have already made the explanation of there. It says: "Conclusions: Fracture of spine and bony ankylosis." I don't see the rest of that on here, with the exception that when we got down to the feet we also described them, which shows a bunion on the foot, and that was merely just to make a statement of everything that we found on the examination. It had nothing to do with his disability. Our diagnosis: Fracture of the spine. Ankylosis, bony of the spine. Atony of muscles of the back. Atrophy of the muscles of the back. Curvature of the spine; kyphosis. Curvature of the spine; scoliosis. Halux valgus; bilateral, meaning a bunion on both feet. Flat foot,

(Testimony of G. I. Birchfield.)

bilateral, and calluses on the feet, and that was the complete examination.

Q. There was no neuropsychiatric examination made? A. No, sir.

Q. If it had come to the attention of the board during that examination that there was any mental or nervous trouble would a special neuropsychiatric examination have been made?

A. The reason we didn't make one was this, because he gave us a very definite history in his own language, and it was so clear that there was no indication of any nervous or mental condition at that time, therefore he was not referred to a specialist.

Q. Doctor, basing your opinion on that examination dated January 18, 1924, would Mr. Mahoney at that time have been able to carry on without injury to himself or to his health the occupation of a clerk? A. Yes, I would say he should.

Q. A meter reader? [321] A. Yes, sir.

Q. Janitor? A. Yes, sir.

Q. If qualified, a bookkeeper or accountant?

A. Yes, sir.

Q. In fact any occupation that did not call for heavy manual labor? A. Yes, sir.

Mr. Dillon: That is all. Thank you. Oh, wait one second. May I be permitted, your Honor?

The Court: Yes.

Mr. Dillon: There is one intervening examination the Doctor did not make.

The Court: Yes.

(Testimony of G. I. Birchfield.)

Mr. Dillon: Doctor, I will read you the findings and examination made April 16, 1926 of William V. Mahoney at Seattle, which are as follows: "Complaint: Pains through the back and hips; when I sit down and get up am all stiff. Findings: Fairly well nourished and developed; skull"—one word I can't read—"eyes and nose referred. Ears and throat and neck"—may I have counsel read it? I think his eyes are better than mine.

Mr. McGan: "Fairly well nourished and developed. Eyes and nose referred. Ears and throat —neck and thryroid normal. Lungs broad and flat. Heart and lungs and abdomen normal." There is an abbreviation there. "No G. I. complaint. No. Romberg. Bones, joints, and extremities all" — and then he has got A. N. or some sort of a sign—" except back and feet referred by Dr."—is that Joiner?

A. Yes, there was a Dr. Joiner there at that time.

Mr. McGan: He has findings on his eye, ear, nose and throat examination. I don't think we need to read all of it. Dr. Seibert's examination, referred: "Back and feet. Scar 8½ inches beginning to the right of 10th dorsal vertebra, [322] extending downward, postoperative for fracture of spine. Scar is well healed. There is rigidity of muscles of back with atrophy, also rigidity of spine in lower dorsal and lumbar. Movements as follows: Forward to 165; backward to 170. Lateral motion about ten degrees to the left. There is a

(Testimony of G. I. Birchfield.)

marked kyphosis from tenth dorsal to lower lumbar, and a slight scoliosis in lower dorsal. Referred for X-ray 2/11/25. Both feet are flat, one dregree; no symptoms. Bunions on both feet. The right one is somewhat tender. Left, no complaint. Small callous under head of fifth metacarpal right."

Q. (By Mr. Dillon) Doctor, would you state what differences, if any, there were in those findings and your examination two years earlier in January, 1924?

A. I couldn't see any difference there at all. It is about the same.

Q. Doctor, basing your opinion as an expert and on these findings and your examination of 1924, would you say that on April 16, 1926 Mr. Mahoney could have carried on without injury to himself or to his health the same occupations that I detailed to you previously?

A. Yes, sir, I believe so.

Mr. Dillon: Thank you very much.

Cross-Examination

By Mr. Bynon:

Q. Dr. Birchfield, are you in Seattle now?

A. Yes, sir.

Q. Are you with the Government?

A. No, I am not with the Government now. I haven't been with the Government since '34.

Q. But you were at the time you made this report?

A. Yes, I was with the Government at that time.

(Testimony of G. I. Birchfield.)

Q. Were you in general practice at that time?

A. No.

Q. Were you following general work, I mean?

[323]

A. Doing general work.

Q. You were not a specialist?

A. No, I did their general work and hospital work for them, and all their treatments.

Q. But you never have specialized in neuropsychiatry? A. No, sir.

Q. Or any form of mental or nervous diseases as a specialist? A. I beg your pardon?

Q. I take it you have never engaged in practice in any form of mental or nervous diseases as specialist.

A. No. I have had a lot of experience in them, but I haven't been a specialist at it.

Q. Your practice has been a general practice?

A. Yes.

Q. On this board you had a man named R. T. Hopkins? A. Yes.

Q. What was his specialty?

A. He was supposed to be the man that described the scars, and so forth, and I had to make the general examination, and he measured the scars. He did the measuring of the scars and the extent that the patient could bend, or what not.

Q. Well, he was specializing in orthopedics, wasn't he? A. Yes.

Q. Tell the jury what that means.

A. That is one that specializes in bone work.

(Testimony of G. I. Birchfield.)

Q. Now A. C. Feaman——

A. (Interrupting) He was the secretary.

Q. He was the secretary and recorder?

A. He recorded it. We made the examination and Dr. Feaman went over it; if he wasn't satisfied with the thing when he was writing it down he would go over it. I might say that Dr. Feaman was a specialist in lung and heart diseases.

Q. You had a lung and heart specialist, and a bone specialist, and yourself as a general practitioner as chairman? [324]

A. That is right.

Q. Do you know why you made this examination?

A. Yes, we made it for a board to find out what his disabilities were.

Q. My point is, were you making a lot of these examinations at that time?

Q. Just in 1924 we started to make board examinations at that time. That was the year we started to make board examinations.

Q. Well, you were making a lot of them at that time, weren't you?

A. Yes, we were making quite a few of them.

Q. Of men disabled in service?

A. Yes, that is right.

Q. And you found the condition of this man's back, where he had a broken back in France? Is that right?

A. Yes, on his record that is what he complained of and that is what we made the examination of.

(Testimony of G. I. Birchfield.)

Q. I notice you say here, Doctor—you use the language that doctors employ, "Tenderness to palpation over this region". A. Yes.

Q. Now in lay language does that mean that he had pain in part of his back where he had his back broken?

A. It means that wherever you put your finger on there and do percussing over the back you might find some tenderness. You have got to put them down as the patient tells you.

Q. Do I understand that the patient says it hurts when you do that?

A. Yes, that is what he tells us, absolutely.

Q. Now you spoke about kyphosis?

A. Yes.

Q. That is one curve in the spine that is not normal, isn't it? A. Yes. [325]

Q. And you found another curve in the spine that was not normal too, didn't you? A. Yes.

Q. In your opinion were those things due to the breaking of his back?

A. Due to the operation of his back, from the stiffness, taking the flexibility out of this back from fixing the spine so that they wouldn't move and it would heal.

Q. You also remarked in these reports about atrophy of the muscles of his back? A. Yes.

Q. Do I understand by that that you mean the wasting away of the muscles of the back?

A. Yes, because he couldn't move those muscles around the area where the stiffness was.

(Testimony of G. I. Birchfield.)

Q. I take it, Doctor, that you did like people would normally do, you took for granted the things you could see about the man and put those down, didn't you?

A. We didn't always take it for granted. It must be remembered that in examining many men that we are pretty well versed on the general attitude of the men that we are examining and we can pretty well tell what to examine them for. His back was his main thing, and if there was anything else we followed it up, and that was why we didn't go any farther than we did. We covered everything that this man complained of in this examination.

Q. Well, you wouldn't expect a man with an unsound mind to know it, would you, Doctor?

A. Well, I don't know whether I would expect it or not. Sometimes we could tell by talking with them. I wouldn't think a man would have an unsound mind that would give us a clear history of where he had been, and it had never been taken before. That was given by him. We put down where he had been and where he had served, and we felt after that, if the man was intelligent enough to give us those things, we didn't have much of a mental case there, and he didn't complain of any nervousness [326] whatsoever in his complaint there.

Q. Doctor, are you telling this jury and telling this Court that you did not have the Veterans Bu-

(Testimony of G. I. Birchfield.)

reau file for this man when you made the examination?

A. We had his file, but at that time we asked him those questions. We didn't copy anything down. I don't think you will find any previous history there. I am saying this because I believe it is so. I don't think you will find any previous history with that notation on there where this man was and what he done, and everything.

Q. Well, if there is such then you are mistaken about that?

A. Yes, I am mistaken if there is such a thing, but I am quite sure there is not.

Q. I will ask you again if you as a medical man would expect a man with an unsound mind to know it or tell you about it.

A. Yes. We gather a lot in practicing medicine. We can tell some of the general nervous conditions of men, their temperament and so forth. We have to have a little inkling of all things that happen to men to know what to do with them.

Q. Would you go with me so far as to say sometimes you don't catch it?

A. Oh, we might not catch it sometimes, but we don't miss many things if we are on our toes. Most of us are.

Q. Well, if this man had an unsound mind at that time you didn't see it, did you?

A. No, I didn't.

Q. Doctor, do you think it would affect this man's central nervous system to be hit on the head

(Testimony of G. I. Birchfield.)

by three sacks of potatoes with force enough to break his spine?

A. Oh, it might at the time, yes.

Q. Do you think it would affect him at all if the injury was sufficient to keep him hospitalized from November 11, 1918 until May 22, 1920?

A. I didn't get all of that question, please. [327]

The Court: Read the question.

(The question was read.)

A. Oh, it might affect him some, yes; it would affect any of us to a certain extent, but they didn't hospitalize him for his mind, they hospitalized him because they wanted to get his spine well.

Q. I am asking you if you think a blow sufficiently heavy to break a man's spine and put him in the hospital eighteen months while they were curing him would affect his central nervous system.

A. Oh, it would affect him some, yes.

Q. And if you found that same man confined to the Oregon State Hospital in 1934 as insane with epileptic deterioration would you think there was any cause for his then condition?

A. Well, I wouldn't think so, because there is a long period of time between the time he got out of the hospital. They most generally recover from nervous shock in that length of time.

Q. I will ask you specifically, Doctor, if you as an expert medical man found that on November 11, 1918 the man suffered the injury that Mr. Ma-

(Testimony of G. I. Birchfield.)

honey did, the one I have just detailed to you which kept him in the hospital for eighteen months, and you found in 1934—without any other intervening cause—him to be found insane in the Oregon State Hospital with epileptic deterioration, would you think there was any cause and effect there? Would you think that the injury which broke his back had anything to do with the insanity and epileptic deterioration? A. No, I don't think so.

Mr. Bynon: That is all.

Redirect Examination

By Mr. Dillon:

Q. Doctor, if in addition the records will show Mr. Mahoney was in no hospital from the date of his discharge until 1934 [328] would that be any additional grounds for your opinion?

A. Yes.

Mr. Dillon: That is all.

Mr. Bynon: No questions.

(Witness excused.)

Mr. Dillon: At this time, your Honor, I had better make inquiry. I desire to read certain portions of Plaintiff's Pre-Trial Exhibit 10 which has been introduced by the plaintiff—no, I see here it has not been introduced. Is that correct?

Mr. Bynon: Part of it has been introduced.

Mr. Dillon: That is true; part of which was introduced. At this time defendant desires to introduce the complete exhibit and to read portion from it.

The Court: There is no objection, as I understand.

Mr. Meindl: We have no objection to counsel reading the defendant's exhibit, but I don't think it would be well to take the time to read the plaintiff's exhibit at this time. He could in his argument at the close of the case, but to read the exhibits offered by the plaintiff is rather unusual.

Mr. Dillon: I am only going to read the ones the defendant is offering in evidence. Plaintiff's have already been read.

The Court: If there is no objection he may introduce them. Have them marked first.

(Defendant's Exhibit No. 10 consists of numerous papers, including a statement by the insured's wife, copy of physical examination, continued notes, discharge slip, and correspondence. That which is pertinent to the issue herein is in words and figures as follows, to-wit:) [329]

(Testimony of G. I. Birchfield.)

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DEFENDANT'S EXHIBIT No. 10

Oregon State Hospital

Hospital Station, Salem, Oregon

#10441

Admitted Mar. 9, 1934

Name and relationship of person giving history Clara Mahoney wife March 19, 1934.

An accurate and intimate knowledge of the previous history of patients admitted to the Hospital is essential for their intelligent and proper treatment, and the friends of patients are earnestly requested to answer the following questions fully, carefully and frankly, as such information will be considered strictly confidential and to return this form to the Superintendent as soon as possible.

1. Name of patient.	Wm. V. Mahoney
2. Age and birthplace of patient.	Age 37 years. Born at Flandreau, South Dakota.
3. Occupation of patient.	Bookkeeper.
4. Occupation of husband or father of patient.	Brick layer
5. Religious persuasion of patient.	Catholic
6. Facts about parents. Were the parents related before marriage? Did either parent have tuberculosis, syphilis or epilepsy? Did either parent show mental peculiarities or insanity? Did either have any criminal history? Was either ever confined in an institution? To what extent did either parent use alcoholic drinks?	Not related before marriage. Neither parent had diseases mentioned. No—both parents normal. No criminal history. Neither parent ever in any institution. Mother did not drink but father drank pretty hard.

7. Answer the inquiries contained in question 6 as they apply to grandparents, uncles and aunts of the patient. And state in each case whether the person affected belongs to the side of the father or to the side of the mother of the patient.	Patients grandparents lived to very old age were not affected by disease never in institutions. Aunts and uncles healthy never in institutions.
8. Facts about brothers and sisters. Number of brothers and sisters living or dead, and causes of death in each case. Mental peculiarities, criminal history and insanity of brothers or sisters. Were any ever confined in any institution. What diseases have they had?	One sister and three brothers living. One brother dead, died in infancy. I do not know the cause. All living brothers & sister healthy—none confined in any institution—one brother had appendicitis. [330]
9. Children of patient. Number living and dead, and causes of death. Miscarriages. Date of birth of last child. Alcoholism, criminality, convulsions, mental peculiarities, or insanity in any of the children.	No children at all.

Defendant's Exhibit No. 10—(Continued)

10. Condition of mother during pregnancy and confinement.	
11. Peculiarities of the patient during childhood.	None.
12. What diseases did the patient have during childhood?	Measles, mumps & chickenpox.
13. School training, age and extent, progress and ability.	Grammar school—University of Washington. Quite able considing his educational background. Also business college.
14. Were any peculiarities noticed at puberty?	None
15. Describe life, moral character, occupation, successes or failures after leaving school. Natural disposition.	He is hot headed—good natured—not lazy—average moral character—sort of a failure because of his physical disability incurred in war—injury to the spine
16. Age at marriage. Were the domestic relations happy or otherwise?	He was married at 23 years of age—not a happy married life.
17. What sickness or disease has the patient ever had?	Spells of dizziness—would fall down and become rigid.
18. What injuries or accident has the patient ever had; Has the patient ever had convulsions or	Spine injured in France. Yes he has had convulsions and fits. No over-exertion or fright.

fits? If so, describe these. Had there been over-exertion or fright?	When he has a spell he falls after sweating, and rumbling noise in throat, becomes rigid for a hour & vomit thereafter—
19. To what extent did the patient use alcoholic drinks or drugs? What kind of liquors were used?	
20. Has patient ever had syphilis.	No.
21. If a woman who has borne children, what was her mental condition during pregnancy and childbirth?	
22. Has the patient ever been insane before? If so, how often, how long, how affected, when and where treated?	No. [331]
23. State fully the first symptoms of mental derangement observed. When they began, and describe the course of the mental disease up to the time of commitment, giving the supposed cause.	Lately he has become violent and strikes me. This is just in last few weeks—I think his trouble is due to his spells which have become more and more frequent.
24. State the condition of the bodily health prior to and during this attack.	He has not been eating or sleeping regularly. His health has not been very good.

Defendant's Exhibit No. 10—(Continued)

25. State any facts in regard to digestion, sleep, gain or loss of flesh.	Digestion fair—sleeps sound—has been losing weight.
26. Has violence to others been threatened or attempted; and if so, in what way?	While drinking he threatened a man with a gun.
27. Has suicide been threatened or attempted; and if so, in what way?	No.
28. State any other facts relating to either mental or physical condition.	Normal mental condition—poor physical condition.
29. Name and birthplace of father; maiden name and birthplace of mother.	Thomas Mahoney born in Ireland—Mother's maiden name was Mann and she was born in Minnesota.
30. Postoffice and telephone address of the nearest relative or friend.	I am his wife, my address is 7026 S. W. Sixth Street, Portland, Oregon, no phone.

(signed) MRS. CLARA MAHONEY

Defendant's Exhibit No. 10—(Continued)

Wm. V. Mahoney C-430 162

Body stripped, found fairly well nourished. Skin clear and of healthy appearance. Pupils dilated but react to light. Teeth in a fair state of repair. Thyroid gland negative. Heart and lungs negative. No tender points over chest or abdomen. No lymphatic enlargement. Negative for hernia, hemorrhoids, flat feet, and varicose veins. Blood Pressure 108/80. Unable to palpate liver, spleen or kidneys. Genitalia negative. Prostate gland small and soft. Has slight hyphosis of lower thoracic region, including the 10th, 11th, and 12th dorsal vertebrae. Gait normal. Reflexes active and equal. Negative for other neurological manifestations. Patient underwent laminectomy operation in 1918. Suffered fracture of probable 10th, 11, and 12th dorsal vertebrae. This occurred in 1918 in France. Patient gives the history of having had convulsions at rather infrequent intervals during the past ten or twelve years. In fact when admitted to the Oregon State Hospital his tongue was badly bitten on each side and occurred during a convulsion. Just prior to admittance here the patient developed an acute psychosis characterized by certain hallucinations and delusions of persecution, believing that someone was after him and that a policeman [332] was going to throw him into the river. In fact he was very much confused and stupid when received here and could give no reliable history at that time. The last several days the patient has completely cleared up mentally, is able to cooperate very well,

Defendant's Exhibit No. 10—(Continued)

is up and about and doing some chores about the hospital premises, and is improving both mentally and physically. He is now under active treatment. Aside from the old injury to the back, patient is in a fair state of physical repair and suffers from no serious organic disease that could be discovered at this examination.

N. P. Diagnosis: 17-A Epileptic Deterioration, undoubtedly traumatic in origin.

March 24, 1934

Ore. State Hosp., Salem, Ore.

Oregon State Hospital

Record of Examination on Admission

Case No. ..... Name Mahoney, Wm. V.

Cooperation ..... Date admitted .....

Date examined 3/15/34 Reliability .....

Age 39 Weight ..... Height .....

Past History

Diseases: Chicken pox Smallpox Diphtheria Measles Mumps Influenza Tonsilitis Chorea Rheumatism Pleurisy Pneumonia Malaria Scarlet Fever Typhoid Fever T. B. Ca.

Convulsions 2-3 yrs. epilepsy

Injuries Frac. 10, 11, 12 dorsal vert. 1918

Operations Lamenectomy 1918

Head: Headache Infrequent

Eyes: Glasses ..... Failing vision .....

Inflammation ..... Pain .....

Ears: Loss of hearing ..... Pain .....

Discharge .....

Defendant's Exhibit No. 10—(Continued)

Nose: Head colds Infrequent Discharge Nose is stuffy

Teeth: .....

Cardio Respiratory: ..... Pain in chest No Palpitation ..... Dyspnea No Cough No [333] Hemoptysis No Edema No Ear ringing No Spots in vision ..... Vertigo No Fainting .....

Gastro Intestinal: ..... Habits of eating normal Appetite Good Nausea No Gas No Vomiting No Hematemesis ..... Colic No Icterus No Diarrhoea No Constipation No Hemorrhoids No Stools .....

Genito Urinary: ..... Dysuria No Mematuria ..... Pyuria ..... Retention No Incontinence No Frequency No Nocturia No Syphilis No G. C. 1916 Soft Chancre No

Physical Examination

General observation .....

Skin Normal [334]

Head No deformities Facies .....

Scalp Normal

Eyes Pupils dilated—react to L. & A.

Ears .....

Mouth Teeth—fair

Lips Normal

Throat Slight infection & granulation

Nack Trachea in midline

Chest Normal

Breasts .....

Lungs Normal

Heart Normal

Defendant's Exhibit No. 10—(Continued)

Pulses .....

Blood pressure 108/80

Abdomen No tenderness, no masses

Liver N. P. Gall Bladder N. S. Kidnesy N. S.

Genitalia (Male) Normal

Extremities Normal

Spine Slight kyphosis of lower thoracix (10, 11, 12).

Joints, bones .....

Glandular system .....

Rectal Prostate small & soft

Neuromuscular Examination

General Gait normal

Muscles Tone normal

Sensation .....

Reflexes Active & equal. No Babinski or Romberg

[335]

Oregon State Hospital

Continued Notes

Name William V. Mahoney Number .....

Age 37, Married, Catholic, Accountant. Born in S. Dakota. In Oregon 8 years. Drinks Moderately. Suicidal. Made attempt. Jumped in river. Delusions of persecution. Thinks that someone tries to get him. Sleep fair. Memory poor. Delusions changeable. Hallucinations of sight, and hearing. Natural temp. poor at present. question of epilepsy. Mrs. Clara Mahoney, Wife. 621 S.E. 6th St. Portland, Ore.

F. KRATTEBOL.

Defendant's Exhibit No. 10—(Continued)

March 16, 1934. Patient agreable. Has had no attacks since received. Takes one luminal morning and night. Trans. to ward 28, to help in the kitchen.

F. KRATTEBOL.

Apr. 5 Trans. to American Lake

C. W. HEWITT (signed) [336]

State of Oregon

..... Oregon State Hospital Violent x Non-Violent .....

Notice of Discharge of:

Wm. V. Mahoney Date April 5, 1934 who was admitted from Multnomah County on March 9, 1934

.....

Superintendent

..... Oregon State Hospital

[337]

Oregon State Hospital

Ward Admission Record

(10441)

Name Wm. V. Mahoney County Mult. Ward C Admitted Mar. 9, 1934 at 7/30 P.M. Bathed 7/35 P.M.

Tendencies: Homicidal Violent Suicidal Depressed

Condition of Person: (General Nutrition, Cleanliness, Vermin, etc.) Fairly nourished and clean

Skin: (Marks, Bruises, Scars, Skin Diseases, Eruptions and Locality) Bruise on index finger of right hand. Bunion on right large toe. Large

Defendant's Exhibit No. 10—(Continued)

scar in center of back. Bruise on right knee. 2 discolorations on left leg.

Physical Disorders: (Deformities, Ruptures, Fractures, Dislocations, etc.)

Quality and Condition of Clothing: Fair quality and clean

Articles Found on Person:

Forward This Report to Office

B. O. LARKINS

Attendant [337a]

F. J. ERNEST

was thereupon produced as a witness in behalf of the defendant herein, and, having first been duly sworn, was examined and testified as follows:

Direct Examination

Mr. Bynon: We will concede the Doctor's qualifications.

Mr. Dillon: His qualifications as an expert in neuropsychiatry?

Mr. Bynon: That is right.

Q. (By Mr. Dillon) Doctor, I hand you through the bailiff report of physical examination dated October 24, 1932, which constitutes a part of defendant's Pre-Trial Exhibit 1 introduced by plaintiff. Calling your attention to Page 5 or 6 of the said report, I would ask you if that is your signature attached thereto. A. Yes.

Q. Doctor, how long have been with the Veterans Administration? A. Since 1922.

(Testimony of F. J. Ernest.)

Q. Specializing in neuropsychiatry?

A. Neuropsychiatry, nervous and mental diseases.

Q. Doctor, calling your attention to the neuropsychiatric examination—is that what it is called?

A. That is right.

Q. Of what date is this?

A. October 24, 1932.

Q. I would ask you of what your examination at that time consisted.

A. It was a complete neuropsychiatric examination, which means that we made a study of the veteran neurologically as well as mentally.

Q. Doctor, what were your complete findings of that examination?

A. Well, I don't find anything in this examination that was definite for any diagnosis in the neuropsychiatric field. I find that he was a well developed and nourished male; had no [339] disturbances in gait or station. He moved about perfectly normally. His muscles were normal except in the back, where there was a scar indicating that he had been operated on at one time, and I knew that that was on account of his having the lower dorsal and lumbar spines fractured while in service. Other musculature was normal, except that he had tremors —by that we mean that there was some shakiness of both of his arms, and especially his ankles, almost an ankle clonus, and that by that we mean that there was a motion there that was almost continuous,

(Testimony of F. J. Ernest.)

with increased reflexes. By that I mean that the muscle tone was more than normal, but not abnormal. It hadn't gotten to the place where we considered it was abnormal unless there were other findings to go with it. It is the kind of thing that we get in people that have been over-stimulated for a time. Unless there is some other reason for it we leave it go at that. His sensory system was essentially negative. By that I mean his touch and feeling and in handling things he was normal. There was no lost sensation or no pathological changes. The thyroid gland was negative. His mental condition at that time was perfectly normal except that he was somewhat apprehensive and was worried and self-concerned. Those things come with the difficulty that he had had, that he had gotten while in service, and it had been with him ever since service. Then the thing that really mentally was bothering him was, he had told me that for the past year he had been having some kind of spells in which he would fall. He had had one, he said, about a year before, and he had had three or four in between, and he had had one not very long before he came in for the examination. That was the real reason for his coming in. He was somewhat worried about these spells. He wanted to know what they were, so after I had completed my examination as far as I could go without laboratory reports I told him I thought he should come into the hospital for a spinal puncture. We wanted the spinal fluid studied to

(Testimony of F. J. Ernest.)

deter- [340] mine whether there was probably something wrong within the brain. It might be a brain tumor, it might be sclerosis of some type, it might be something that was growing within the cranium that would bring about these spells. I asked him if he drank much, because alcohol often accounts for this sort of thing in this type of case, and he denied it; said he didn't drink. Then I told him he should have the spinal puncture because there might be something going on there that we should know now in order to either remove it or to fix it so that he would not have any more of these spells, but he said he had had s much trouble with his back that he didn't want anybody monkeying around his back, especially with a needle, unless it was absolutely necessary, and that if he continued to have the spells he would come back later and then if we thought it was necessary he would let us do a spinal puncture.

Q. What was your final opinion or summary, Doctor?

A. Well, my conclusion was—I can state it better probably just as it is here. The patient for years has been rated as permanently disabled on account of atrophy, muscles of the back, curvature of spine, with ankylosis, and arthritis, chronic. We have demonstrated some abnormality in both lower extremities, more marked in the right, and patient gives a history of seizures, during which he loses consciousness. He states that right upper extremity has a feeling of heavy helplessness before he loses

(Testimony of F. J. Ernest.)

consciousness, at the same time there is a roaring in the ears, and then oblivion; then he goes out. After he first finds himself it requires several moments before he becomes oriented, before he knows just where he is. When he comes to it takes a little while to realize where he has been for the last moments before. This history highly suggests epileptoid seizures. I use the word "epileptoid" because the word "epilepsy" just means falling sickness; it means that there is something the matter with the man and he falls down. [341] Neuropsychiatrists have adopted a method of applying epilepsy only to organic disease, to where there is something wrong with the brain or something involving the brain that brings about these spells, rather than emotional things like any hysteria where they will fall in spells of this kind or where they faint and fall, as they do when there is a lack of blood supply to the brain. It is falling sickness just the same, but we don't call that epilepsy. In my examination I said "epileptoid", meaning it was like an epileptic attack because he had these sensations coming on and then he would have the falling sickness afterward, and we would call the falling sensation that came on first as an aura, meaning that it is something that notifies him that he is apt to have a spell. This history highly suggests epileptoid seizures, and inasmuch as the first occurred about a year ago, and at that time he was 35 or 36 years old, they should be

(Testimony of F. J. Ernest.)

due to some organic disease or to intoxication, that is, any sort of drugs. Alcohol will do it. There are a number of other drugs that bring about an intoxication, and as result of the intoxication oftentimes they have seizures. A lot of men when they are drunk have seizures. Not every drunk man does; it depends on the individual. We say they have to be allergic to whatever the drug is, whether it is whiskey or morphine or codine or some other drug. They have to be more or less alergic to it or they won't have seizures, so in that way they are different from other people. He denies the use of alcohol or other drugs. Then I went on with the explanation of my reason, as I say, for asking for laboratory proof that there was something wrong within the brain or cord, not because I thought of any specific disease, but the spinal fluid, the water on the brain, as you talk about it, tells us if there is a tumor or degenerative changes within the cranium, referring to the brain tissue itself. All that is read by chemical analysis and by microscopic studies of this fluid when it is used in the laboratory, [342] and for that reason we asked for a spinal fluid report. Then of course we didn't get it so I couldn't make a diagnosis on what I had learned or what he had told me, and without the laboratory findings I just made a diagnosis of "Undiagnosed." We have a number for that in the Veterans Administration. It means that there aren't sufficient manifestations, we

(Testimony of F. J. Ernest.)

haven't found enough the matter with him to warrant us in concluding he has any special disease.

Q. Doctor, from the mental standpoint would you say at the time of that examination, October 24, 1932, there was any abnormality of the mind?

A. There wasn't any that I could find. His reactions I thought were pretty normal. He stated that should seizures persist—these may be his own words because my secretary is a stenographer and she takes them down as they are given—or any new disturbance arise he would report to the hospital for further study. That is the reaction of a normal individual, especially one that had had a lot of back trouble and didn't want anymore.

Q. Was there any indication to you of any unsound mind there?

A. Oh, no, no, this is a perfectly normal reaction.

Q. Was there anything indicated that would have prevented him having the capacity for determination of whether he had any legal rights?

A. You mean whether he knew right or wrong, or what do you mean exactly?

Q. Was there any disturbance there as to his capacity for determining his ordinary legal rights?

Mr. Bynon: That is objected to. That is one of the ultimate questions in this case. It invades the province of the Court and jury.

The Court: I understand that is what you say is involved in this situation; that is your contention. The witness is [343] answering an expert question

(Testimony of F. J. Ernest.)

whether he was normal enough to carry on under normal conditions.

Mr. Bynon: I think on the same theory, your Honor, all other ultimate questions of fact have to be resolved by your Honor and the jury. We are back where we were some years ago before the practice was established, and I submit, your Honor, that is one of the questions——

The Court: (Interrupting) I permitted you to ask a question whether at the time of the examination the condition was incurable. It is the same problem. I think he may answer.

A. I didn't find anything in any examination to indicate that he didn't know exactly what he was doing. I think the evidence we have right here in the report is even better than opinion because he is clear in his understanding of what I wanted him to do and he gave a very good reason why he didn't want a spinal puncture, and certainly he would be able to know whether he had rights as any ordinary citizen would know them.

Q. (By Mr. Dillon) Doctor, is there any connection between epilepsy itself and possibly a subsequent mental condition? Do I make myself clear? A. No, you don't.

Q. I mean if a man has epilepsy does he ordinarily have a mental disturbance or become of unsound mind? Can that be due to epilepsy?

A. Do you mean that every epileptic has an unsound mind? No.

(Testimony of F. J. Ernest.)

Q. Is there as a general rule in the early stages of epilepsy any connection between epilepsy and insanity?

A. Well, it is true that epileptics after a period of years and where they have had a number of seizures—the epileptic seizure is only a manifestation of an insult. By an insult I mean some disturbance that happens to the brain. I might compare it this way, that lightning and thunder results from electricity jumping from one cloud that has more electricity [344] than the other that gets close enough so that the electricity jumps from one over to the other, and it produces a disturbance in the atmosphere. You see the lightning and hear the thunder. Now if in one part of the brain that same thing happens—I am not telling you that it is electricity; I don't know, I am only giving that as a simile, but it is some disturbance that happens between one area of the brain and another and it is that explosion or reaction that takes place that brings about the picture that we call epilepsy, the falling sickness that absolutely knocks him out for the time. He doesn't breathe; even his heart appears to stop for a time, and then he falls and then he gradually comes back again. Now it was an explosive thing that took place, and after a man has had many of those through his life he tends to deteriorate, because those insults coming one after the other tend to bring about enough destruction so that he is never really normal.

Q. You have given what I was going to ask,

(Testimony of F. J. Ernest.)

Doctor, the meaning of epilepsy with deterioration.

A. Well, we have many epileptics that don't show deterioration for years.

Q. Deterioration usually comes or can come at anytime?

A. That is the idea, depending on the number and severity of the insults or the seizures. The seizure is the manifestation that tells you how serious it is.

Q. Doctor, you have that exhibit still in your hand. Turn to the examination reports of October 29 to November 5, 1937. Is there an examination there made by you? A. 11/4/1937.

Q. You made an examination at that time?

A. Yes.

Q. You have the report of that examination before you? A. I have. [345]

Q. What was your diagnosis at that time?

A. Psychosis, with epileptic deterioration.

Q. Will you explain what that means, Doctor?

A. That means that these seizures that he has had and the insults to the brain over this period of time have brought about changes that make him different from what he was before. In other words I say "psychosis", and the deterioration is the mental changes or reduction that has come about as a result of all this, that has brought about the psychosis. The word "psychosis" or "psychotic" is the same as the legal term meaning insane.

Q. Then, Doctor, the difference between your

(Testimony of F. J. Ernest.)

examination in 1932 and your examination in 1937 was very marked?

A. Oh, yes. In the first one there was no evidence of any mental change, and in the last one he is definitely psychotic, with deterioration.

Q. When that condition arrives, that psychotic condition, it is not difficult for a psychiatrist to *not* it, is it?

A. Well, it is isn't difficult for anyone to note it. As a matter of fact, the psychoses are usually diagnosed by the family of the patient and the ordinary physician. The only thing the psychiatrist does is classify it.

Mr. Dillon: I think that is all. Thank you, Doctor.

Cross-Examination

By Mr. Meindl:

Q. Doctor, just what is epileptic deterioration?

A. It is a reduction in mental capacity as the result of the shocks to the central nervous system that have come about from these brain insults.

Q. That is not a normal mind, is that it then, Doctor?

A. No, just to the degree they are deteriorated that is abnormal.

Q. What is traumatic epilepsy?

A. Traumatic epilepsy is epilepsy the result of trauma, [346] usually to the head, in fact I wouldn't recognize trauma as a factor in epilepsy unless the head was injured.

Q. What is trauma?

(Testimony of F. J. Ernest.)

A. Trauma means compact, or to be struck, traumatized, to be hit, to be shocked.

Q. Doctor, would it be a trauma if an individual was hit on the head by three sacks of potatoes which fell with such a force that it broke his back?

A. Now wait. I don't know if I understand your question. Will you repeat it, please?

The Court: Read the question.

(The question was read.)

A. Yes.

Q. (By Mr. Meindl) That would be a trauma?

A. That would be a trauma, definitely.

Q. Would that be a sufficient trauma to cause traumatic epilepsy?

A. Well, I can't understand trauma to the head-breaking the lower dorsal and lumbar spines without breaking his neck. I can't understand that.

Q. Yes, Doctor, but would you answer the question? Would that be a sufficient trauma to cause traumatic epilepsy?

A. Well, it might be and might not. A lot of people have been hit on the head time and time and time again, knocked down as they are in prizefighting, and they never have epilepsy.

Q. And with their back broken, Doctor?

A. Yes, we have men that had their backs broken that never have epilepsy. It is a rare thing that you have epilepsy with a broken back.

Q. I mean the combination, being hit on the head and getting the back broken?

(Testimony of F. J. Ernest.)

A. Well, it depends on how much he was hit on the head, don't you see? Frankly, I didn't think the hit in the head had anything to do with the epilepsy in this case. [347]

Mr. Meindl: If your Honor please, I move to strike the Doctor's volunteer statement as not in response to any question whatsoever.

The Court: Yes, it is stricken.

Q. (By Mr. Miendl) Would you have recognized Mr. Mahoney when he came into the courtroom, Doctor? A. Oh, yes.

Q. How long has it been since you had seen him? A. Since I saw him?

Q. Yes.

A. Well, I have seen him a number of times. I can't just tell how long. He was brought into the hospital, I think, on one occasion; I don't know the date. The reason I remember definitely, he came in and we took care of him over night and then he came up to see me in the morning and wanted to go home, and I told him I didn't see any reason why he couldn't go home. He seemed to be all right then. He had just had a seizure, and he went down from the hospital—it was just three or four blocks—on to Terwilliger Boulevard, and he was walking along there and had another seizure and was picked up by someone coming along in a car and brought back to the hospital, so I remember that affair distinctly. That is in the last few years; I don't remember just what year.

Q. What did you notice different about his con-

(Testimony of F. J. Ernest.)

versation the last time you saw him and when you first saw him in '32, Doctor?

A. Well, the first time I saw him his conversation and his attitude, except that he was worried about these spells, wasn't anything that was out of the normal for a man who had had as much disablement, or did have as much disablement as he had as a result of his war injury, and at the last time he was—well, he wasn't all there. He wouldn't carry on a conversation normally. If you would ask him a question he would answer it one way, and maybe you would ask him practi- [348] cally the same thing a little later and he would tell you something entirely different. He was rather restless. He was somewhat confused. I didn't bring out any delusions or hallucinations. He just had the picture of one who was somewhat lost. He wasn't quite sure where he was or what he was doing and you couldn't depend on what he was telling you. In other words he was deteriorated, he was mentally changed, and he wasn't competent. He wasn't all right.

Q. That is based a whole lot on his conversation and being restless, is that it, Doctor?

A. Well, it is the whole picture. When we are examining a man or observing him it isn't what he says so much as the was he says it. There is a lot in how he looks, how he moves about. All of those things are taken into consideration, as well as what he tells you.

(Testimony of F. J. Ernest.)

Q. Was his conversation rambling and disconnected?

A. That is what I meant when I said you would ask him a question and he would answer it one way and then the next time you would ask him pretty much the same question and he would tell it in another way, and he might wander off from his answer and start to talk about something else altogether.

Q. Doctor, what is an electroencephalogram? How do you pronouce it?

A. An electroencephalogram. Well, an electroencephalogram is just another new gadget we have to try to determine the waves of the brain. Encephalon means brain, and of course the electro part of it is an electric appliance of the high frequency order that has been worked on for a number of years, maybe thirty years, but since we have had this ultra development in short wave they have come a little farther along. It is a laboratory device in which I think they use about eight elecrodes, and they are all attached to a machine that has been built up by men who are making studies along this line. One of the latest ones now is being developed down [349] in the University of California. They talk about the alpha, beta, and delta rays or waves. The alpha is normal for one thing and beta is normal for another, and when you have those two normal and you don't get a delta you consider that there isn't any pathology or any diseased condi-

(Testimony of F. J. Ernest.)

tion in the brain, but the one that really answers your question is the delta. For instance, I am talking to you about it and I know about the machine, but my effort to read the gram, the picture that the pen points after the patient has been fixed up with one of these and the current turned on, would be of very little or no value, because I don't know about it, only that I read about it in the maga- and he has to have had a lot of experience with that kind of a thing. The purpose of it is to determine if there is a brain tumor or something, and its location, so that they can go in and remove it, and it is a good thing and ultimately it may become another added good laboratory modality for determining these things that you are talking about.

Q. You used no such test on Mr. Mahoney, did you, Doctor?

A. No, we didn't have them at that time. They have only been used in the last year or two.

Q. In other words you never have used such a test on him?

A. No, but we get reports by—well, I wouldn't know about it, only that I read about it in the magazines. We have regular neuropsychiatric or neurological magazines and these things come out as they are developed——

The Court: (Interrupting) All right, that is all right. Go ahead with something else.

Q. (By Dr. Meindl) Doctor, assume that an individual appeared normal, happy, working, and then two years later upon being seen again changes

(Testimony of F. J. Ernest.)

are noted such as sitting and staring off in space and being highly nervous, being irritable and feeling that people were against him, being suspicious of people, [350] including members of his family, and while employed would hide out and being found would be either standing staring out the window or standing with a blank expression on his face. His conversation would be rambling and disconnected. He would talk about one subject and all of a sudden be off on another subject. He didn't associate with people, kept to himself, was a loner, took prejudice against certain people, didn't seem to want to talk to anyone, and had a vacant stare, felt people were against him. What are those symptoms of, Doctor? This is a hypothetical case.

Mr. McGan: If the Court please, I object to that as not proper cross-examination. It wasn't gone into on direct.

The Court: He is testifying as an expert. He may answer.

A. They are evidences of an abnormality. If they are continuous and always present it would be an evidence of mental deterioration, of change.

Q. (By Mr. Meindl) Even of psychosis, wouldn't it, Doctor?

A. Well it depends on the degree. Suspiciosness is the main thing in your syndrome; that is the more important thing. Staring out of the window and being irritable—there may be a lot of physical reasons that will bring about that, and there may be emotional attitudes that would bring

(Testimony of F. J. Ernest.)

it without any deterioration but if he is delusional and suspicious of others that would be an evidence of deterioration.

Q. It would be an indication of an unsound mind, in other words; is that it?

A. Yes, to that degree it would be unsound.

Q. As I understand, Doctor, on direct examination you said the older members of the family or friends noticed those things and the psychiatrist merely classified them, is that it?

A. Yes, that is the usual thing. The psychiatric individual is brought to the psychiatrist because of his abnormality.

Mr. Meindl: That is all. [351]

Redirect Examination

By Mr. Dillon:

Q. Doctor, in an isolated instance of the type described there would be no basis for any diagnosis, would there? A. No.

Q. They would have to be carried on over a considerable period of time and noted as a habit and continuation before significance could be read into them, would they not?

A. Yes. Deterioration means — like anything else that deteriorates it has progressed, it has changed and a deterioration never recovers.

Q. And if a man suffering from after-effects of an operation of the severity of Mr. Mahoney in this case—if two years afterwards he was inclined to be irritable and was inclined to get angry and

(Testimony of F. J. Ernest.)

suspicious, and quarreled, would that not be more or less a natural development of such a physical condition?

A. It certainly is a common manifestation of those that suffer from it.

Mr. Dillon: That is all, Doctor.

Recross-Examination

By Mr. Meindl:

Q. Doctor, isn't it common for a person to have an injury sufficient to be delusional and to be suspicious? A. No.

Q. You did not intend for that to be included as being a common thing, in other words?

A. He didn't say anything about suspicion.

Q. I believe the question is, Doctor, if it has been included you would not have answered the same way?

A. May I have the question that was asked first?

The Court: Read the question.

The Reporter: I am not sure which question they refer to.

The Court: I am not either.

Mr. Meindl: May we have the last question asked by Mr. [352] Dillon, your Honor?

The Court: Yes.

(The record was read)

The Witness: Well, I believe my answer that I made would stand on that. The suspiciousness is now one of the things, and I am explaining that

(Testimony of F. J. Ernest.)

that is not common for people that are suffering from physical disabilities.

Mr. Meindl: That is all.

Mr. Dillon: That is all, Doctor. Thank you.

(Witness excused.)

Mr. Dillon: I have one more exhibit to introduce. At this time the Government offers in evidence Defendant's Pre-Trial Exhibit 3 to which I understand there is no objection.

The Court: What is the further course of the case? Have you any more witnesses?

Mr. Dillon: No, your Honor.

The Court: Does this conclude it?

Mr. Dillon: Yes.

Mr. Meindl: In the event that that exhibit is admitted into evidence then we would have an exhibit which is marked as a pre-trial exhibit to offer in rebuttal, your Honor.

The Court: Will you have any rebuttal?

Mr. Meindl: No witnesses, your Honor, no.

The Court: No witnesses and no rebuttal. How long will it take to present this case?

Mr. Bynon: In argument, your Honor? We are entirely willing to abide by your Honor's ideas, or we will stipulate between us.

The Court: I don't want to limit you to a definite time. If it won't take too long I will hold a session tomorrow. If it is going to take too long a time I will put it over until Monday. [353]

Mr. McGan: We are pretty brief on this, your Honor.

The Court: I will rule tonight about these exhibits and then will hold a session tomorrow. Would there be any objection on your part?

Mr. McGan: No.

The Court: Would it inconvenience any of the jury to start early tomorrow morning?

(Further discussion as to time of reconvening.)

The Court: Court is now in adjournment until tomorrow morning at nine-thirty.

(Thereupon, at 5:25 o'clock P. M., December 11, 1942 an adjournment was taken until 9:30 o'clock A. M. December 12, 1942.) [354]

Portland, Oregon
December 12, 1942
9:30 o'clock A. M.

(Pursuant to adjournment.)

The Court: You may proceed, Gentlemen. The court now has an offer before it.

Mr. Dillon: Yes, your Honor.

The Court: The Court admits the portion of the matter which relates to vocational training, the third page of the exhibit, and excludes the rest. An exception is given to both sides.

Mr. McGan: Your Honor, would it be all right just to cut that first page out there?

The Court: Yes, or have somebody make a transcript of it before it goes to the jury. I don't care how it is done.

Mr. Meindl: We have no objection to just extracting the first page.

The Court: All right.

Mr. Dillon: The Government rests, your Honor, with respect to the proffer on that ruling. I don't think it is necessary.

The Court: You may reserve a place in the record, and that may be made later.

Mr. Meindl: The plaintiff also will rest. No rebuttal.

The Court: Yes.

Mr. Dillon: At this time the Government would like to make two motions out of the hearing of the jury.

The Court: Let's get the record closed first. That sheet is excluded. This is the present Exhibit 3.

[355]

(The certificate and statement of vocational payments, Defendant's Pre-Trial Exhibit No. 3, was received in evidence, and is in words and figures as follows, to -wit: [356]

Mahoney, William V.
R-204,755
C-430,162

Copy

STATEMENT OF VOCATIONAL TRAINING PAYMENTS MADE IN THE CASE OF WILLIAM V. MAHONEY

No. of Checks		Period Covered			Rate	Amount Paid
(a)	1 Adj.	1- 9-22	through	1-31-22	$100.00	$ 73.33
	4	2- 1-22	"	3-31-22	100.00	200.00
	2	4- 1-22	"	4-30-22	145.00	145.00
(b)	1 Adj.	1- 9-22	"	3-15-22		100.50
	2	5- 1-22	"	5-31-22	145.00	145.00

No. of Checks	Period Covered			Rate	Amount Paid
1 Adj.	3-16-22	"	3-31-22		$ 22.50
14	6- 1-22	"	12-31-22	$145.00	1015.00
1 Adj.	1- 1-23	"	1-15-23		71.17
1	1-16-23	"	1-31-23	145.00	72.50
(c) 23	2- 1-23	"	1-15-24	145.00	1152.50 115.00
(d) 1 Adj.	2- 7-24	"	2-15-24		30.00
(3) 1 Adj.	2- 7-24	"	2-15-24		10.50 3.00
5	2-16-24	"	4-30-24	145.00	337.50 25.00
1 Adj.	5- 1-24	"	5- 8-24		36.00 2.67
			Total Paid		$3957.17

(a) $100.00 rate of payment per month effective 1-9-22.
(b) $145.00 rate of payment per month effective 1-9-22.
(c) Award divided. Payment of $10.00 per month made to wife.
Training interrupted 1-16-24.
(d) $100.00 rate of payment per month effective 2-7-24.
(e) $145.00 rate of payment per month effective 2-7-24.
Rehabilitated 5-8-24.

I hereby certify that the above statement is a true, correct and complete record of vocational training payments as shown by the accounts of the Accounting Division.

(signed) WM. H. HOLMES,
May 4, 1942. Chief, Accounting Division. [357]

The Court: You may make your motion.

Mr. Dillon: In the jury's presence, your Honor?

The Court: No, make your motion now.

Mr. Dillon: Comes now the defendant and moves the Court to grant an allowance of its motion to dismiss, for the reason——

The Court: (Interrupting) You want to rely on the grounds you have stated?

Mr. Dillon: Yes, on the simple grounds that the Court lacks jurisdiction. I take it that is overruled, your Honor.

The Court: Yes, the motion is overruled.

Mr. Dillon: Comes now the defendant and makes its motion for a directed verdict for the reason that the plaintiffs have failed to establish by substantial evidence the insured herein was totally and permanently disabled while the policy of insurance being sued upon was in force and effect.

The Court: The Court will reserve ruling on the motion. Argue the case to the jury.

(The case was thereupon argued to the jury by counsel for the respective parties.)

[Endorsed]: Filed April 23, 1943. [358]

And Afterwards, to wit, on the 10th day of May, 1943, there was duly Filed in said Court, Transcript of opening statement of defense counsel, Court's instruction to Jury, Argument of defense counsel to jury designated by appellee, in words and figures as follows, to wit: [359]

[Title of District Court and Cause.]

TRANSCRIPT OF OPENING STATEMENT OF DEFENSE COUNSEL. COURT'S INSTRUCTIONS TO THE JURY. ARGUMENTS OF DEFENSE COUNSEL TO THE JURY. [360]

Portland, Oregon, December 10, 1942.

Before:

Hon. James Alger Fee, Judge.

Appearances:

Messrs. Allan A. Bynon and Gerald J. Meindl, appearing for Plaintiff.

Messrs. Francis J. McGan and Daniel Dillon, appearing for Defendant.

Edwin L. Holmes, Reporter.

OPENING STATEMENT OF DEFENDANT

Mr. Dillon: If the Court please, and Ladies and Gentlemen of the Jury, as the Court has explained to you, there are two facts here for your determination; one, whether Mr. Mahoney was totally and permanently disabled from any cause whatsoever [362] on August 31, 1920, when he ceased to pay premiums on the policy he now sues upon. The second is, whether on July 3, 1931 he was actually crazy, or at that time had been rated insane or incompetent by the Veterans Administration.

Mr. Mahoney's service in our armed forces is meritorious and extremely commendable. He suffered not at the front, but equally as important, whilst with our expeditionary forces in France, where he received an accident. He was in a hospital from that time in the army until his discharge sometime afterwards, and the injuries he received to his back were serious and they have been permanent since that day to this.

The Government admits without any hesitation that Mr. Mahoney has a permanent disability and has had a permanent disability of severity since the day of this discharge from the army but the Government contends that this permanent disability did not become total, giving him the benefit of every doubt, until at least 1934. The Government will show by deposition from the people who know him in his home town that he did return from the army and after hospitalization was able to work and did work. It is admitted and is common sense, which you will gather very quickly, that at no time of course could Mr. Mahoney do physical labor of any heavy degree. His activities were of necessity confined to what we call sedentary, light, or office work, and the Government appreciated this fact and gave him what is called vocational training, that is, they sent him [363] to the University of Washington, they gave him practical training with concerns for two years and a half, and at the end of that time he was called rehabitated, that is, in the opinion of the men who trained him and his teachers he was able to carry on as an accountant and bookkeeper.

As a matter of fact Mr. Mahoney has done practically no work since his graduation from vocational training. I think it will appear in the evidence that that has been due in great measure not to Mr. Mahoney's inability to work, but that Mr. Mahoney did not desire to work and for certain reasons did not have the incentive to work. Those will be the facts that the Government will endeavor to establish

in respect to the first question of fact as to whether or not Mr. Mahoney was totally and permanently disabled when he ceased to pay premiums on this policy on August 31, 1920, which includes the 31 days' grace he had on the policy. [364]

DEFENDANT'S ARGUMENT TO THE JURY

Mr. McGan: May it please the Court, counsel, and Ladies and Gentlemen of the Jury, I shall first perhaps say something about the policy of insurance. This action, as you know, is what is known as a war risk insurance case.

During the last war the Government issued policies of insurance to its soldiers in any amount from a thousand dollars up, in multiples of five hundred dollars, insuring them against death or permanent and total disability. The principal sum of this policy was ten thousand dollars. It provided that in case of death while it was in force the principal sum would be paid to his beneficiary. In case of permanent and total disability it would pay $57.50 per month during permanent and total disability. In this suit it is contended that Mr. Mahoney became permanently and totally disabled on the 22nd day of May, 1920, when he was discharged from the army or at some time during the period of insurance protection, which ceased when he ceased to pay premiums. He paid one premium after he got out, and the policy lapsed, including the grace period, on the 31st of August, 1920. So one of the questions which will be submitted to you

is whether or not he was at that time permanently and totally disabled, and I am going to ask you to examine all this evidence critically before you reach your decision. Particularly I want to say to you that there isn't any question at all about this man's disability being severe, particularly [367] at this time. He is no doubt permanently and totally disabled now. He no doubt has been for several years, perhaps since 1936. He had in the army a very severe back injury; he broke three vertebrae in his back, and he had the laminectomy—that is the operation where they ankylose the bones, and the back in that portion becomes stiff.

He was kept in the army a year or a little over a year after his injury, in fact he was kept from the 11th day of November, Armistice Day, 1918, until the 22nd day of May in 1920, so it is eighteen months at least that he was kept in the army, and of course he was kept in army hospitals and treated. However, the records show that he wasn't in bed all that time. When he was discharged he was still weak, and his discharge shows that, but after his marriage in Illinois on the 27th day of May, 1920 he went home to his old home at Minot. [368]

COURT'S INSTRUCTIONS TO THE JURY

The Court: Ladies and Gentlemen of the Jury, you have now heard all of the evidence and had introduced before you all of the evidence and have heard the arguments of counsel in the case of Portland Trust and Savings Bank, a corporation,

Guardian of the Estate of William V. Mahoney, Incompetent, Plaintiff, against the United States of America, Defendant. The case has been thoroughly and ably presented to you, and it is now the duty and pleasure of the Court to instruct you as to the legal rules which control the determination of the facts in the case, because as you know, this is an action upon a contract and your findings must be based upon the legal rights and liabilities which arise out of the contract and the law relating thereto.

Now in any case there are certain matters which come before you which are not in themselves evidence and which are not to be considered by you as such. There are certain references to the pre-trial order, which is the basis upon which the case is tried, and there are certain matters of proffered testimony which are excluded by the Court, based on the rules of law. These of course you will not take into consideration in your determination of the case except so far as they are submitted to you in the course of the instructions.

Counsel have made arguments before you. Counsel are [380] respectively employed by the guardian of the soldier and by the United States. It is their duty to their respective clients to present fairly and impartially their side of the case, but obviously counsel are advocates; they are employed for the very purpose of presenting that side of the case and naturally take that point of view. It has been found during a long course of legal history that the fairest way of determining a controversy is to have

it presented to an impartial body of jurors by advocates who do represent the respective parties.

The point to remember about the arguments of counsel, however, is that counsel are not witnesses. The facts that they bring before you are their memory of the testimony which you have also heard. It is your duty to decide the case upon the testimony and other evidence which is before you. It is true if it seems reasonable to you you may adopt any inference which is made by counsel on either side, but you are not bound to do so.

Now there are certain agreed facts in this case which you can take from the record made by the parties. That is, in the first place, the Portland Trust and Savings Bank is the guardian and has the right and does bring this action on behalf of William V. Mahoney, who is an incompetent at the present time, and the parties have further agreed that William V. Mahoney enlisted in the military service of the United States on July 13, 1917, likewise that he was honorably discharged [381] therefrom on May 22, 1920. You have heard also that that was on a certificate of discharge; that on December 7, 1917 the insured applied for and was granted a contract of war risk yearly renewable term insurance in the sum of ten thousand dollars —now this is the contract—wherein and whereby the defendant, that is, the United States, agreed in the event Mahoney became permanently and totally disabled while the insurance policy was in full force and effect, to pay the insured the sum of $57.50 a month so long as he remained permanently and

totally disabled, in consideration of the premiums to be paid by Mahoney as made and provided below. Now then, the important point about that is the premiums of insurance were paid to and including the month of July, 1920. No premiums were paid thereafter. By reason of the grace period the policy of insurance remained in full force and effect to and including the 31st day of August 1920.

Now then, the claim that the guardian makes for the veteran Mahoney was that as a result of physical and mental disabilities he became permanently and totally disabled on the 22nd day of May, 1920, and the Government denies and contests that. The Government also denies and contests that at any time during the period of insurance protection under the above mentioned policy of war risk yearly renewable term insurance he became permanently and totally disabled; in other words that is a definite denial up to the 31st day of August, 1920 or at any time subse- [382] quently if you find the insurance policy was in effect.

Now then, it is further claimed by the guardian for Mahoney that he was insane and mentally incompetent on May 22, 1920. The Government denies that. It is further contended that he has been continuously since that date insane or incompetent and that he was rated insane or incompetent by the Veterans Administration on or prior to the 3rd day of July, 1931, and each of those matters the Government denies.

Now reviewing the evidence I can say that he was rated insane or incompetent by the Veterans

Administration either on or prior to the 3rd day of July, 1931, but the other branch of that question will still be before you as to whether or not Mahoney was insane on the 3rd day of July, 1931 and before that time.

Then we come down to the question which I will submit to you: Was the insured insane on the 3rd day of July, 1931? Of course if the plaintiff is going to recover in this case he would also have to prove that he was totally and permanently disabled prior to that time, and that relates to the next question: Did the insured, that is, Mahoney, become totally and permanently disabled as the result of physical and mental disabilities May 22, 1920 or at any time when his war risk yearly renewable terms insurance was in full force and effect? Now those are the two questions you have to answer.

We will take up the general rules regarding that. [383] The plaintiff is bound to prove by a preponderance of the evidence, first, that the insured, Mahoney, was insane on and before July 3, 1931. Likewise in order to recover they must next prove that he was totally and permanently disabled on or before August 31, 1920. That means that the plaintiff has the burden of proof in that regard and must prove those matters by a preponderance of the evidence.

That sounds like a mysterious term, but it is not. It simply means the greater weight of the credible evidence, that is, the testimony and the written documents that have been produced before you.

When evidence is produced on one side of an issue which when fairly and impartially considered by you produces the stronger impression or has the greater weight or is more convincing as to its truthfulness, that side which produces it may be said to have sustained the particular issue by the preponderance of the evidence, when you consider all the evidence on that issue.

Now we will take up the first issue, because if you should find that the veteran, Mahoney, was not insane on the first critical date of July 3, 1931 then you need proceed no further in this case, because that will settle the controversy. The Government has set a limit on the bringing of these cases by legislation and that limit is raised if the person is found to be insane as of the date July 3, 1931, because the Government would not charge him with the responsibiilty of bringing [384] a case if he were insane.

Now what is insanity? Well, you know without definition that it is a deviation from the norm or the normal behavior of the human being, and in determining whether or not Mahoney was insane you will be governed in general by the things which I am about to say by way of definition. Insanity means derangement or disorder of the mind or of the emotions. The term "insane" implies every degree of unsoundness of mind. Insanity is a disease or abnormal condition which manifests itself in accentricities of conduct, speech, or appearance, that is to say, in the doing and saying of things which attract attention, because, judged by the com-

mon standards, they are deviations from that which is regular and usual, and acts, declarations, and conduct inconsistent with the character and previous habits of the person. Of course you realize that it is not all eccentricities which are chargeable as insanity. It is not all conduct and the doing and saying of things which attract attention which constitutes insanity. You know that of your own knowledge without my saying anything more about it. You realize the difference between a normal person who is eccentric and an insane person. Insanity is a mental, emotional manifestation of disease whereby the understanding is impaired or one or more of the faculties of the mind perverted, weakened, or destroyed. Of course you know this can be established by lay testimony as well as by expert testimony, because in our ordinary, normal [385] intercourse we recognize the difference betwen the insane person and the normal person.

By insanity it is not meant a total deprivation of reason, but only an inability from defect of memory and judgment caused by mental or emotional derangement to act with an intelligent apprehension of the nature and consequences of action.

To constitute insanity there must be such a deprivation of reason or judgment as to render the person incapable of understanding and acting with discretion as a normal person in the ordinary affairs of life, and want of sufficient capacity as a result of emotional derangement to transact ordinary business and to take care of and manage the person's property and affairs. I again call your attention

to the normal person that can't just exactly take care of himself owing to bad judgment, and so on. You realize, of course, that there is a great difference between that and insanity, which is abnormal behavior. Bad judgment is normal to some persons, perhaps, but no normal person is insane, and you can recognize it when you see it.

Now as I say, you will first take up the consideration of that question as to whether on that critical date, July 3, 1931, the insured, Mahoney, was insane. If you find he was insane on that date, as I have defined it to you, then you will take up the other question. If you find that he was not insane, that he was normal, although possibly diseased on that date, [386] you will proceed no further. You will just answer that question and bring in a verdict for the defendant, because under those circumstances he must have brought suit prior to that time if Mahoney himself was able to understand and appreciate things as a normal person, even though you find he used bad judgment in not continuing to pay the premiums.

Now we turn to the other question. The other question is a different one, although there are some of the elements which are applicable to each of these questions. The next question is: Was he permanently and totally disabled according to the definition that I shall give you on May 22, 1920 or on or before August 31, 1920? In that connection there are three essential facts which the plaintiff must prove in order to establish that the insured, Ma-

honey, is entitled to recover, or that the plaintiff is entitled to recover in his behalf. The first is that Mahoney was totally disabled. The second is that he was permanently disabled, and the third is that this permanent and total disability occurred and was present in the soldier on May 22, 1920 or on or before August 31, 1920 and at a date when his policy was alive. It has been agreed before that his policy was alive on August 31, 1920, and if he was then on that date proven to be permanently and totally disabled then plaintiff, the bank, would be entitled to recover, but plaintiff cannot recover if the disability of the soldier was total but not permanent on that date. [387]

On the other hand, the bank would not be entitled to recover if the soldier had permanent disability on that date which was partial in its nature. That is not total disability at that time, and both total and permanent disability must have occurred during the time the policy was in force and effect by the payments made before August 31, 1920.

In order that you shall fully understand this situation I shall now give you some definitions of types of disability. Total disability is any impairment of body or mind which renders it impossible for the disabled person to follow continuously any gainful occupation. Such a disability is deemed to be permanent if founded upon conditions which render it reasonably certain that it will continue during the life of the disabled person. This sort of disability does not mean incapacity to do any work at all. Disability is not confined to impair-

ment of strength or ability to pursue continuously his usual occupation, or any particular occupation, but it embraces such impairment as will disable him from following continuously any substantially gainful occupation. He might be disqualified or disabled from following one occupation, yet there might be other occupations which he could follow which would bring him substantial income or which could be regarded as substantially gainful occupations. Your problem in this case is to determine Mahoney's ability to work at the time of the lapse of the policy of insurance. That is the sole question that is presented to [388] you upon this branch of the case. Inability to perform hard labor is not the test. The measure of permanent and total disability is whether the infirmity in body or mind renders it impossible for a person to follow continuously any substantially gainful occupation.

The word "continuously" requires only a continuity which is reasonably regular in its character and not frequently interrupted by periods of inability to work to such an extent that the person does not have the ability to follow a substantially gainful occupation or to be employed to the satisfaction of a reasonable employer. It does not mean that the soldier should have worked every day or every week or every month, but it means that he should have the ability or capacity to follow some substantially gainful occupation to the satisfaction of a reasonable employer, or that he was able to follow some employment, pursuit, or occupation that could be depended upon for earning a livelihood.

In other words permanent and total disability does not mean helplessness or complete disability. In other words if a person should be bedridden and you should find that there were separate and distinct periods of temporary inability to perform any work at all, that would not necessarily spell total and permanent disability. Likewise, if you find that there is some partial disability which is not total in its nature you must remember that the definition requires total [389] disability.

It is true, of course, that a disease of the mind or the nerves or emotions may be just as preventative of a man's being employed at a gainful occupation as if he had his legs cut off. You know that insanity might be a permanent and total disability, and as I understand now the Government admits that at the present time this man is permanently and totally disabled by reason of his mental condition. That has nothing to do with his physical condition particularly or directly. But when you come to relate the present condition back, there the Government says, "There was a certain time in 1936 when we conceived that he was permanently and totally disabled, but we don't think that there was a period prior to that time when it can be established", and of course if that is the fact you can't relate it back without evidence or by speculation or conjecture. You must find some facts which are proven in the case which show that the permanent and total disability which exists now did actually, according to the facts that

you have before you, exist at the previous time.

If you don't find that the soldier became permanently and totally disabled until sometime after the policy lapsed then he cannot recover. In other words if you should determine that he became permanently and totally disabled sometime in 1936 for the first time then that would bar his recovery. The question is not whether he is totally and permanently [390] disabled now or whether he was totally and permanently disabled as of July 3, 1931 on this branch of the case, but whether he was totally and permanently disabled on or before the time his policy lapsed, and generally speaking it would lapse on August 31, 1920. It is true that if at that date he was permanently and totally disabled then he was relieved from the necessity of paying further premiums, but if he were not permanently and totally disabled he was in the same situation as anyone else. You can't continue a policy of insurance in force without continuing to pay the premium, and it is an admitted fact in this case that his grace period on the premiums expired August 31, 1920.

Even if his earnings were not substantial at any occupation, that would not necessarily determine the question, because the definition that controls this case is that permanent and total disability means that he is in such a condition that he cannot follow continuously a substantially gainful occupation, and that that is founded upon conditions which render it reasonably probable that it will continue throughout his life.

This policy of war risk insurance, however, does not guarantee success in any business undertaking, but it does insure him against a condition where he is not able, does not have the ability, to follow a substantially gainful occupation because of his physical and mental condition. [391]

It is important, of course, for you to consider the work record in the case insofar as there is any evidence of it, and I will not comment on the question of fact at all, but you have heard that he was employed during certain periods of this time and you should carefully consider the evidence to determine whether that falls within the definition that has been given.

Of course in connection with the work record I will repeat to you that disability may as well result from the condition of the mind and the nerves as from any other causes, and if a man is so inattentive or forgetful or unable to take care of himself as a result of mental or nervous disorders that he cannot be trusted to carry on simple forms of work without direction, he is as truly disabled from earning a livelihood as one who must refain from work on account of the condition of his vital organs. So in considering any work record that you find you may consider the question of whether he was employed through sympathy, as has been urged, or whether he was just carrying on an ordinary job like anybody else.

The plaintiff cannot recover in this case on the theory that the soldier was injured while he was in the army. There is evidence that tends to show

that the soldier did at one time during his service have a very serious injury, but that alone does not entitle the plaintiff to recover unless this condition was, or before the lapse of the policy became, connected with other matters such as the claimed mental dis- [392] order in this case, of sufficient severity to render it impossible for him to follow any substantially gainful occupation thereafter. If such conditions existed then the plaintiff would be entitled to recover. If the soldier had other disabilities which, taken in connection with the particular disability, the broken back, would render it impossible for him to follow continuously any substantially gainful occupation after August 31, 1920, plaintiff of course would be entitled to recover.

Now there is another situation. You have the opinions by physicians and psychiatrists who are skilled in matters concerning the human body and human mind and its reactions. These are things which we as laymen do not understand as well as those who have made studies of the particular types of conditions that result from physical and mental infirmities. These gentlemen were brought here to testify, and they have given testimony. You should give consideration to what they say on account of the fact that they have had peculiar training and experience with this type of disability, and you may use that evidence for what purposes you wish. There is one important factor for you to consider in that regard. If they say, "On a certain

day I saw a man", that is testimony as to a fact, but when they get into opinion evidence and say, "It is my belief or my opinion that he was insane on a certain date", then you are dealing with a different type of evidence. That [393] is what we call opinion testimony or opinion evidence. The physician or psychiatrist may upon the witness stand testify as to facts as do other witnesses, and when they do so you should judge their testimony on the same basis as you do that of any other witness, but when they testify upon matters of opinion, as to how long a disease existed or when it was acquired or what severity it had acquired at certain times, that is opinion upon their part and it is not binding upon you. You should judge such testimony in the light of your own good judgment and experience with affairs, and it is not binding upon you. It is true that if in the light of your experience with affairs you think that the doctor is right of course you may accept his testimony, but he is simply here to give you his opinion and you are not bound by it.

It has been mentioned in argument that you are not to be influenced by any sympathy or feeling which you have for the soldier or anyone involved in the case. It is true that the evidence has indicated that the soldier was injured while he was in the service, and while the United States owes him an obligation—which apparently it has recognized in certain respects, for instance, as regards vocational training—you are not to take that into

consideration in deciding this lawsuit. The soldier and the United States had a contract whereby he was insured against permanent and total disability. He kept that contract in force and effect by payments up to a [394] certain time, and he had the option, if he had wished or anybody had wished in his behalf, to keep those payments up, and the insurance could still be in effect up until the time that the finding was made. Now in that respect you have a right to consider his mental condition and the question as to whether he was permanently and totally disabled, because in either event if he was insane and thereby permanently and totally disabled he wouldn't have sense enough to keep his policy in effect, perhaps. Those are all questions for you, but you must remember that this is a litigation that should be decided as though it were between two private individuals and without respect to sympathy on one side or the other. You should not weigh it at all by any sympathy or feeling that you may have for any person in the case, nor the fact that the United States is one party to the contract.

You are the sole and exclusive judges of the facts in the case and the credibility of all the witnesses. Your power of judging the effect or value of evidence, however, is not arbitrary but must always be exercised with legal discretion and in subordination to the rules of evidence.

The direct evidence of one witness to whom you give full credit and belief is sufficient to establish any issue in this case. You are not bound to find

a verdict in conformity with the declaration of any number of witnesses which do not produce a conviction in your minds as against the testimony [395] of a less number or against a presumption or other evidence which does satisfy your minds.

Every witness is presumed to speak the truth. This presumption may be overcome, however, by the manner in which he testifies, the character of his testimony, or by evidence affecting his character or motives, or by contradictory evidence.

If you find that a witness has testified falsely in one material part of his testimony you may look with distrust upon the other evidence given by such witness, and if you find that a witness has testified wilfully false you will be at liberty to disregard all the testimony given by such witness unless corroborated by other evidence which you do believe.

Any fact in the case may be proven by direct or indirect evidence. Direct evidence is that which tends to prove a fact in dispute directly, without any inference or deduction, but which in itself if true conclusively establishes the fact. If a witness testifies to a transaction to which he has been an eyewitness, that is direct evidence. Indirect or circumstantial evidence is that which tends to establish a fact in dispute by proving another, and which though true, does not in itself conclusively establish the fact but affords an inference or a presumption of its existence.

Ladies and Gentlemen, the law requires me now to discuss the law of this case with counsel, and

if you will sit there for a few moments I will then be able to discharge you. [396] Counsel and the Court will retire.

Mr. Dillon: We have no exceptions.

Mr. Bynon: We have no exceptions, your Honor.

Mr. McGan: If your Honor please, by way of suggestion I would like to ask you to read this (tendering a paper to the Court).

The Court: There is a matter that has been called to my attention which I didn't entirely cover. There is some testimony in the record regarding vocational training, which you will consider to determine whether or not the payments received for vocational training and the manner of work done did constitute a substantially gainful employment. It is true that the veteran would be afforded this opportunity by the Government irrespective of whether it was their theory that he was gainfully employed or not, but you may take that into consideration in determining whether those payments throw doubt upon the question of whether he was able to be gainfully employed at that time.

You will have with you in the jury room the forms of verdict. There are three different forms here. The first is entitled "Special Interrogatories", and you will deal with these first. The first interrogatory is: "Do you find from the evidence that the insured, William V. Mahoney, was insane on July 3, 1931?" You will answer that "Yes" or "No". If you answer it "Yes" then you will proceed to determine other [397] questions in the

case. If you answer it "No" you will proceed no further, but immediately find a verdict for the defendant, the Government, according to the other form.

Then if you answer it "Yes" you may take up Interrogatory No. 2, which reads: "Do you find from the evidence that the insured, William V. Mahoney, was permanently and totally disabled May 22, 1920 or at any time when his War Risk Yearly Renewable Term Insurance was in full force and effect?" If you answer that "Yes" then you will proceed to find a general form of verdict for the plaintiff, and this general form of verdict for the plaintiff, omitting the formal portions, reads: "We, the jury, duly impaneled and sworn to try the above entitled cause, do find in favor of the plaintiff and against the defendant, and find that the insured, William V. Mahoney, was, on the 22nd day of May, 1920, and ever since has been totally and permanently disabled, and further find that the insured, William V. Mahoney, was, on the 3rd day of July, 1931, and ever since has been and is now, insane."

As I say, if you answer either of these questions in the negative, either as to whether he was insane on July 3, 1931 or the second, then you will find for the Government, and you will find this general form of verdict: "We, the jury in the above entitled cause, return our verdict for the defendant and against the plaintiff."

In all events both the interrogatories and the form [398] of general verdict must be signed by

your foreman alone. Since this case is tried in the Federal Court each of the determinations, whether to the questions or to the general verdict, must be unanimous, and therefore before you return these verdicts to the Court you will check up to see that you are in unanimous agreement upon every question submitted.

Swear the bailiff.

(The bailiff was sworn.)

The Court: Now Ladies and Gentlemen, since there are some of you who are anxious to get away I am going to allow you to retire and determine this problem for yourself. If you are not anxious to get away I shall immediately send you to lunch, but if you are anxious to get away you can determine these problems before you go out, and if not you may tell the bailiff at any time that you wish to be taken to lunch.

You may now retire in charge of the bailiff. I wouldn't try to settle it here.

(Thereupon the jury retired at 12:35 o'clock P.M., December 12, 1942.) [399]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edwin L. Holmes, hereby certify that I reported in shorthand the above entitled cause at the trial thereof, that I subsequently reduced to typewriting that portion of my shorthand notes covering the defendant's opening statement, the defendant's argument to the jury, and the Court's

instructions to the jury, and that the foregoing and hereto attached 38 pages, numbered from 1 to 38, both inclusive, constitute a full, true and accurate transcript of the defendant's opening statement, the defendant's argument to the jury, and the Court's instructions to the jury, so taken by me in shorthand as aforesaid.

Dated at Portland, Oregon, this 6th day of May, 1943.

EDWIN L. HOLMES
Reporter.

[Endorsed]: Filed May 10, 1943. [400]

And Afterwards, to wit, on Monday, the 17th day of May, 1943, the same being the 67th Judicial day of the Regular March, 1943, Term of said Court; present the Honorable James Alger Fee, United States District Judge, presiding, the following proceedings were had in said cause, to wit: [402]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING THE RECORD ON APPEAL

Upon application of the defendant, the United States of America, and for good cause shown, and being fully advised in the premises,

It Is Hereby Ordered, and this does order that the time for filing the record on appeal herein and docketing this action in the Circuit Court of

Appeals for the Ninth Circuit is extended to and including the 12th day of June, 1943.

Dated this 17th day of May, 1943.

JAMES ALGER FEE
Judge.

[Endorsed]: Filed May 17, 1943. [403]

CERTIFICATE OF CLERK

United States of America
District of Oregon—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 401 inclusive, constitute the transcript of record on appeal from a judgment of said Court in a cause therein numbered Civil 923, in which Portland Trust and Savings Bank, a corporation, Guardian of the Estate of William V. Mahoney, incompetent, is plaintiff and Appellee, and United States of America, is defendant and Appellant; that said transcript has been prepared by me in accordance with the designations of contents of the record on appeal filed therein by appellant and appellee and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that the foregoing is a full, true and correct transcript of the record and proceedings had in said Court in said cause, as the same appear of record and on file at my office and in my custody, in accordance

with the said designations. There is not in the record of said cause any opinion on the motion to set aside verdict, and for judgment for defendant.

I further certify that the cost of the foregoing transcript is $5.00 for filing Notice of Appeal, and $63.40 for comparing and certifying the within transcript, making a total of $68.40, which has not been paid by appellant but is a constructive charge against the United States.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at Portland, in said District, this 12th day of May, 1943.

[Seal] G. H. MARSH,
Clerk. [404]

[Endorsed]: No. 10458 United States Circuit Court of Appeals for the Ninth Circuit United States of America, Appellant, vs. Portland Trust and Savings Bank, a corporation, Guardian of the Estate of William V. Mahoney, Incompetent, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed June 11, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 10458

UNITED STATES OF AMERICA,
Appellant

vs.

PORTLAND TRUST AND SAVINGS BANK, a Corporation, Guardian of the Estate of WILLIAM V. MAHONEY, Incompetent,
Appellee.

STATEMENT OF POINTS UPON WHICH THE APPELLANT INTENDS TO RELY ON APPEAL.

Comes Now the appellant, the United States of America, and hereby specifies as the points upon which it intends to rely on its appeal from the judgment in the above entitled action the following:

I.

That the Court erred in denying and over-ruling defendant's Motion to dismiss made at the close of the plaintiff's case on each and all of the grounds as stated therein. Page 266 certified transcript.

II.

That the Court erred in denying and over-ruling defendant's Motion to dismiss made at the close of all the evidence on each and all of the grounds as stated therein. Page 358 certified transcript.

III.

That the Court erred in denying defendant's Motion for a directed verdict made at the close of all the evidence on each and all of the grounds as stated therein. Page 358 certified transcript.

IV.

That the Court erred in denying defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial on each and all of the groups as stated therein.

Motion, page 23 certified transcript.

Order denying motion, page 27 certified transcript.

Dated this 1st day of June, 1943.

CARL C. DONAUGH,
United States Attorney.
JAMES H. HAZLETT,
Assistant United States Attorney.
FRANCIS J. McGAN,
Attorney, Department of Justice.
(Attorney for Defendant.)

Service of the above and foregoing Statement of points upon which the appellant intends to rely on

appeal, and receipt of a true and correct copy thereof, acknowledged this 1st day of June, 1943.

BYNON & MEINDL,
By GERALD J. MEINDL,
(Attorney for Plaintiff.)

[Endorsed]: Filed Jun. 12, 1943.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Comes Now the appellant, the United States of America, and designates as the portions of the record in the above entitled cause to be contained in the printed record on appeal the following:

1. Complaint, with the date of filing endorsed thereon. Page 2 certified transcript.
2. Answer. Page 7 certified transcript.
3. Amended Pre-Trial Order. Page 10 certified transcript.
4. Special interrogatories submitted to the jury with the answers of the jury recorded thereon. Page 15 certified transcript.
5. Verdict. Page 17 certified transcript.
6. Judgment, with the date of filing and entry endorsed thereon. Page 19 certified transcript.
7. Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new

trial, with the date of filing endorsed thereon. Page 23 certified transcript.

8. Opinion of the Court, if any has been filed, on defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial. Page none filed certified transcript.

9. Order denying defendant's Motion to set aside verdict and judgment, and for judgment for the defendant, in accordance with its motion to dismiss and its motion for a directed verdict, or, in the alternative, for a new trial, with the date of filing endorsed thereon. Page 27 certified transcript.

10. Transcript of the evidence and proceedings had at the trial except the instructions of the Court, the opening statement of defendant's counsel to the jury, and excepting also the arguments of defendant's counsel to the jury. Pages 39 to 358 inclusive certified transcript.

11. Notice of appeal, with the date of filing endorsed thereon. Page 29 certified transcript.

12. Statement of points upon which the defendant intends to rely on appeal filed in the District Court. Page 31 certified transcript.

13. Designation by defendant of contents of record on appeal filed in the District Court. Page 34 certified transcript.

14. Clerk's Certificate. Page 402 certified transcript.

15. Statement of points upon which the appellant

intends to rely on appeal filed in the Circuit Court of Appeals.

16. Designation of the parts of the record to be printed filed by appellant in the Circuit Court of Appeals.

Dated this First day of June, 1943.

CARL C. DONAUGH
United States Attorney
JAMES H. HASLETT
Assistant United States Attorney
FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for Defendant.

Service of the above and foregoing Designation of record on appeal, and receipt of a true and correct copy thereof, acknowledged this 1st day of June, 1943.

BYNON & MEINDL
By GERALD J. MEINDL
Attorneys for Plaintiff.

[Endorsed]: Filed June 12, 1943

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLEE OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED

Comes Now the appellee, Portland Trust and

Savings Bank, a corporation, Guardian of the Estate of William V. Mahoney, incompetent, and designates as the parts of the record in the above entitled cause to be contained in the printed record on appeal, in addition to those parts designated by the appellant, the following:

1. Designation by plaintiff of additional matters to be included in the record on appeal filed in the District Court. Page 37, certified transcript.

2. Part of defendant's counsel's opening statement to the jury. Page 362 through line 16 on page 364, with words ending "he had on the policy.", certified transcript.

3. Part of defendant's counsel's argument to the jury at the close of the testimony. Page 367 through line 15 on Page 368, ending with words "his old home at Minot", certified transcript.

4. Court's instructions to the jury. Page 380 to 399, inclusive, certified transcript.

Dated this 3rd day of June, 1943.

ALLAN A. BYNON
GERALD J. MEINDL
Attorneys for Appellee.

Service of the above and foregoing Designation of Additional record on appeal and receipt of a true and correct copy thereof acknowledged this 3rd day fo June, 1943.

JAMES H. HAZLETT
Of Attorneys for Appellant.

[Endorsed]: Filed June 11, 1943

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION BY APPELLANT OF ADDITIONAL PARTS OF THE RECORD TO BE PRINTED

Comes Now the appellant, United States of America, and designates as additional parts of the record in the above entitled cause to be contained in the printed record on appeal, in addition to those parts heretofore designated by the appellant and the appellee, the following:

1. The opening statement of defendant's counsel to be printed in its entirety.

2. Arguments of defendant's counsel to the jury to be printed in their entirety.

Dated this 21st day of June, 1943.

CARL C. DONAUGH
United States Attorney
JAMES H. HAZLETT
Assistant United States Attorney
FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for Appellant

[Title of Circuit Court of Appeals and Cause.]

AFFIDAVIT OF SERVICE

Emma Valk, being first duly sworn on oath, deposes and says: That she is a citizen of the United States and a resident of the State of Montana, and is over the age of eighteen years, and not a party to or interested in the above-entitled action; that she served a copy of the Designation by appellant of additional parts of the record to be printed in the above-entitled cause on Bynon & Meindl, attorneys for the plaintiff herein, by depositing in the United States Post Office at Butte, Montana, on the 21st day of June, 1943, said copy securely sealed in an envelope addressed to Bynon & Meindl, Attorneys at Law, 1406 American Bank Building, Portland, Oregon and sent under the Government frank, no postage thereon being required; that the said Portland, Oregon is the place of residence of the said attorneys; that on the said date there was a regular communication by United States mail between said Portland, Oregon and said Butte, Montana.

EMMA VALK

Subscribed and sworn to before me this 21st day of June, 1943.

[Seal] HAROLD D. ALLEN
Deputy Clerk, U. S. District Court, District of Montana.

[Endorsed]: Filed June 23, 1943

[Title of Circuit Court of Appeals and Cause.]

AMENDMENT TO DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED

Comes Now the appellant, the United States of America, and files this amendment to the Designation of the parts of the record to be printed heretofore filed herein and designates the following portions of said record to be omitted from the printed record on appeal:

1. Omit all of the language, words and figures contained in and appearing in the last eleven lines on page 39 of the certified transcript.

2. Omit all of the language, words and figures contained in and appearing on pages 40, 41 and 42 of the certified transcript.

3. Omit all of the language, words and figures contained in and appearing in the first twenty-eight lines on page 43 of the certified transcript, down to and including the words, "Mr. Meindl: Yes, your Honor."

4. Omit all of the language, words and figures contained in and appearing on page 106 of the certified transcript.

5. Omit all of the language, words and figures contained in and appearing in the last eighteen lines on page 107 of the certified transcript, beginning with the words, "United States of America".

6. Omit all of the language, words and figures contained in and appearing on pages 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123 and 124 of the certified transcript.

7. Omit all of the language, words and figures contained in and appearing in the first eight lines on page 125 of the certified transcript.

8. Omit all of the language, words and figures contained in and appearing in the last three lines on page 126 of the certified transcript.

9. Omit all of the language, words and figures contained in and appearing on pages 127, 128, 129 and 130 of the certified transcript.

10. Omit all of the language, words and figures contained in and appearing in the first twenty lines of page 131 of the certified transcript.

11. Omit all of the language, words and figures contained in and appearing on pages 140, 141, 142, 143, 144, 152, 153, 154, 155, 156, 157, 158 and 159 of the certified transcript.

12. Omit all of the language, words and figures contained in and appearing in the first eight lines on page 164 of the certified transcript.

13. Omit all of the language, words and figures contained in and appearing on page 258 of the certified transcript, beginning after question 20. with the words, "If Patient Is of Foreign Birth" and ending with the words, "(f) If ever confined in an institution where and when?".

14. Omit all of the language, words and figures contained in and appearing on page 263 of the certified transcript.

15. Omit all of the language, words and figures contained in and appearing on pages 303, 304, 305 and 306 of the certified transcript.

16. Omit all of the language, words and figures contained in and appearing on page 334 of the certified transcript, beginning with the twelfth line with the words, "Gynecological History:" to and including the twenty-seventh line, beginning with the words, "Special Remarks:".

17. Omit all of the language, words and figures contained in and appearing on page 335 of the certified transcript, beginning with the word, "Perineum" on line twenty-three and ending with the words, "Special remarks;" on line twenty-seven.

18. Omit all of the language, words and figures contained in and appearing in the first eleven lines on page 336 of the certified transcript, down to and enclosing the words, "Chest Back".

19. Omit all of the language, words and figures contained in and appearing on page 338 of the certified transcript.

20. Omit all of the language, words and figures contained in and appearing on page 356 of the certified transcript, excepting therefrom the first four lines of said page.

Appellant designates the following to be contained in the printed record on appeal:

1. Order of the District Court extending the time for filing the record herein in the Circuit Court

of Appeals and docketing the said cause to and including the 12th day of June, 1943.

Dated this 1st day of July, 1943.

CARL C. DONAUGH
United States Attorney
JAMES H. HASLETT
Assistant United States Attroney
FRANCIS J. McGAN
Attorney, Department of Justice
Attorneys for Appellant.

[Title of District Court and Cause.]

AFFIDAVIT OF SERVICE

Emma Volk, being first duly sworn on oath, deposes and says: That she is a citizen of the United States and a resident of the State of Montana, and is over the age of eighteen years, and not a party to or interested in the above-entitled action; that she served a copy of the Amendment to designation of the parts of the record to be printed and an uncertified copy of pages 38 to 358, inclusive, of the transcript in the above-entitled cause on Bynon and Meindl, Attorneys for the plaintiff herein, by depositing in the United States Post Office at Butte, Montana, on the 1st day of July, 1943, said copies securely sealed in an envelope addressed to Bynon and Meindl, Attorneys at Law, 1431 American Bank Building, Portland, Oregon

and sent under the Government frank, no postage thereon being required; that the said Portland, Oregon is the place of residence of the said attorneys; that on the said date there was a regular communication by United States mail between said Portland, Oregon and said Butte, Montana.

EMMA VALK

Subscribed and sworn to before me this 1st day of July, 1943.

[Seal] HAROLD D. ALLEN
Deputy Clerk, U. S. District Court, District of Montana.

[Endorsed]: Filed July 7, 1943.

No. 10458

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

CARL C. DONAUGH,
United States Attorney.

FRANCIS M. SHEA,
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LESTER P. SCHOENE,
Director, Bureau of War Risk Litigation.

WILBUR C. PICKETT,
Assistant Director, Bureau of War Risk Litigation.

KEITH L. SEEGMILLER,
Attorney, Department of Justice.

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CITATIONS

551716—43——1

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PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

JURISDICTION

This is an appeal by the United States from a judgment against it for the proceeds of a policy of yearly renewable term insurance.

Whether the District Court had jurisdiction is one of the questions presented by the appeal for decision by this court. The governing statute is Section 19 of the World War Veterans' Act (38 U. S. C. 445), and the jurisdictional question is whether the suit was brought within the time prescribed in that section. Otherwise, compliance with the statute, and hence jurisdiction, is not denied.

The jurisdiction of this court is conferred by 38 U. S. C. 445 and 28 U. S. C. 225. The judgment appealed from, entered on December 14, 1942 (R. 19),

became final upon denial, on February 1, 1943 (R. 22–23), of defendant's motion for judgment notwithstanding the verdict, or for a new trial (R. 20–22). Notice of appeal was filed on April 23, 1943 (R. 23–24), within the time provided in 28 U. S. C. 230.

STATEMENT

A policy of yearly renewable term insurance was issued to William V. Mahoney on December 7, 1917, and premiums were paid upon it until August 1, 1920. Protection under the policy expired on August 31, 1920, at the expiration of the grace period for payment of the premium due on the first day of that month (R. 10). Twenty-one years later, July 28, 1941, a claim for benefits under the policy was filed in the Veterans Administration, alleging that the insured became totally permanently disabled while the policy was in force. The claim was denied on November 3, 1941 (R. 10), and this suit was brought on November 19, 1941 (R. 2).

In an effort to avoid the bar of limitations, which otherwise would have fallen on July 3, 1931 (Section 19 of the World War Veterans' Act, *infra*), plaintiff alleged in its petition that the insured had been insane and incompetent continuously since May 22, 1920, and that he was rated by the Veterans Administration as insane and incompetent prior to July 3, 1931 (R. 4). In its answer, the Government denied the alleged occurrence of total permanent disability while the insurance was in force (R. 7), and likewise denied the allegations with respect to insanity and incompetency (R. 8).

Pursuant to pretrial agreement, the case was tried upon the issues of whether the insured was insane, or was rated by the Veterans' Administration as insane, on or prior to July 3, 1931,[1] and whether he became totally permanently disabled on or prior to August 31, 1920 (R. 11). A jury trial on these issues resulted in a general verdict for the plaintiff (R. 15), in addition to affirmative answers by the jury to special interrogatories as to whether the insured was insane on July 3, 1931,[2] and totally permanently disabled while his insurance was in force (R. 17). The judgment appealed from (R. 16–19) rests upon that ver-

[1] It may reasonably be doubted that insanity on this date would bring the case within the statutory exception. The limitations provision most favorable to plaintiff was enacted on July 3, 1930, providing that no suit would be allowed unless brought within one year from that date. As enacted on that date, the statute provided "insane persons * * * or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities." If the statute is interpreted as speaking as of the date of its enactment, as the language clearly warrants, it would mean persons who were then insane, that is on July 3, 1930. That view accords with the rule, usually governing exceptions in statutes of limitations in favor of persons under legal disability, that the exception is not applicable to disabilities arising after the limitations period had commenced to run. *DeArnaud* v. *United States*, 151 U. S. 483, 496; *Harris* v. *McGovern*, 99 U. S. 161, 167–168. However, the evidence with respect to July 3, 1930, is substantially the same as that relating to July 3, 1931, and hence, for the purpose of this appeal, the issue as made in the District Court may be accepted without prejudice to either party in this particular case.

[2] At the trial there was no evidence whatever relating to an administrative rating of the insured as incompetent prior to July 3, 1931, that contention apparently being abandoned entirely.

dict and, in this court, reversal of it is sought upon the ground that there is no substantial evidence to support a finding for plaintiff on either of the issues tried. The points were raised in the court below by the Government's motions for dismissal and for a directed verdict at the close of all the evidence, and its post-verdict motion for judgment, all of which were denied (R. 396–397, 19–23).

QUESTIONS PRESENTED

1. Whether there is any substantial evidence to show that William V. Mahoney was an "insane person," within the meaning of Section 19 of the World War Veterans' Act (38 U. S. C. 445), on July 3, 1931.

2. Whether there is any substantial evidence to show that William V. Mahoney was totally permanently disabled on or prior to August 31, 1920.

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act of October 6, 1917, and insured against death and permanent total disability (c. 105, 40 Stat. 398, 409; 38 U. S. C. 511) occurring during the life of the contract.

Section 13 of the War Risk Insurance Act (c. 105, 40 Stat. 399; 38 U. S. C. 426) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *.

Pursuant to this authority, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading, in pertinent part, as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Section 19 of the World War Veterans' Act, as amended July 3, 1930 (c. 849, sec. 4, 46 Stat. 992; 38 U. S. C. 445), provides, in pertinent part, as follows:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to

bring suit after the removal of their disabilities. * * *

ARGUMENT

Plaintiff's own evidence conclusively refutes its claims that the insured was totally, permanently disabled on or before August 31, 1920, and that he was insane on or before July 3, 1931

Plaintiff's evidence establishes that the insured recovered from an injury to his back, sustained in November 1918, and that after such recovery he was able to perform work of any character not involving heavy lifting or other strenuous physical exertion. So far as physical disability is concerned, the evidence establishes so plainly that he was able to work that we assume that no contention will be made to the contrary. At least, plaintiff's evidence shows that the insured worked regularly over a period of eighteen months subsequent to the lapse of his insurance, and that immediately thereafter he followed a course of vocational training for more than two years, and there seems to have been no evidence even intended to show that he was not physically able to carry on those undertakings.

Lay witnesses for plaintiff testified, in effect, that during the period of hospital treatment for his back injury the insured became nervous, irritable, and nonsociable; that his speech became rambling; and that such conditions continued over an indefinite period after his discharge from the service. The same witnesses declined, however, to characterize his condition as insanity, and the plaintiff's medical evidence establishes that he was not afflicted with a mental disability

of any character affecting his judgment or ability to work.

One of the plaintiff's two expert witnesses declined to express an opinion that the insured was insane at any time prior to 1934, upon the ground that available information (facts recited by plaintiff's counsel in a hypothetical question) provided a basis for nothing better than a "wild guess." Plaintiff's other medical expert testified that, in 1920 and thereafter until 1934, the insured was mentally ill, of unsound mind, by which he meant only that his "judgment, behavior, manner, or emotional reactions, one part of all of these things," were altered.

Finally, it is established by the plaintiff's evidence that long subsequent to the lapse of his insurance the insured became afflicted with epilepsy, possibly causing light attacks, not recognized as attacks by the insured or his wife, as early as 1925, but not manifesting itself in an attack of unconsciousness until October 1931, and not attended by any psychosis until after November 1932.

SUMMARY OF THE EVIDENCE [3]

Plaintiff introduced the official records of the insured's military service showing that he was a laborer by occupation, 21 years of age at the time of his enlist-

[3] The plaintiff introduced the Government's pretrial Exhibit No. 1, consisting of the Government's medical records pertaining to the insured, as well as certain depositions taken by the Government and, hence practically the whole of the evidence was introduced by the plaintiff. Accordingly, the text of this summary is devoted to a statement of the plaintiff's evidence, with references to the evidence introduced by the defendant restricted to footnotes and parenthetical statements.

ment on July 15, 1917, and that he was discharged on May 22, 1920 (R. 100). These records show that on November 11, 1918, three sacks of potatoes fell upon the insured's head (R. 103), causing simple fracture of a number of his vertebrae, apparently, the 10th, 11th, and 12th dorsal (R. 107–108, 109), and deviation of the 1st, 2nd, and 3rd lumbar, and possibly the 9th dorsal, (R. 119, 121). There was no injury to the spinal cord (R. 128).

On the date of the injury, a laminectomy was performed and in February 1919 a cast was applied (R. 114). In the summer of 1919, he was supplied with a brace to support his back (R. 115). Hospital treatment for him continued from the time of his injury to the date of his discharge from the service, with the exception of two furloughs from October 30, 1919, to January 10, 1920 (R. 110), and January 17 to 24, 1920 (R. 111).

With a cast or brace, he was able to sit up and walk about (R. 118), although unable to help himself in such matters as getting up and down, dressing or wrapping his leggings (R. 114, 116, 118, 128). The records contain a note that on April 7, 1920, he was "walking without a brace and he walks better" (R. 116). An absence of pain was noted as of August 22 (R. 124) and September 30, 1919, and on the latter date it was recorded that he "Eats & sleeps well" (R. 118). On February 28, 1920, extreme nervousness, bordering on hysteria, was noted (R. 119), but the Army records make no reference to nervousness on any occasion either before or after February 28, 1920.

Upon his own application (R. 102), he was discharged from service before the maximum improvement was obtained. Upon careful consideration of the evidence obtainable, including a critical examination of the insured, a board of medical officers found his disability at that time to be absence of motion in lower dorsal and lumbar region left, with marked scoliosis. The board estimated his disability as 80% for his prewar occupation of laborer (R. 103).

In 1919 or 1920, or both, the insured spent some time at home by reason of the death of his father. His service records show that both of his furloughs (October 30, 1919, to January 10, 1920, and January 16 to 25, 1920), were on account of the death of his father. Some of the lay witnesses testified that he was home on furlough in 1919, and others fixed the time as 1920. It is fair to assume, we believe, that he was home on both occasions.

A number of lay witnesses (three brothers and a sister of the insured) were called by plaintiff to describe his condition while he was home on furlough.

John H. Mahoney testified that when the insured returned home he met him at the train, finding him bent over and crippled, and wearing a brace around his body to support his back (R. 76); that the insured said his back hurt him; that he appeared to be in pain; and that he walked home instead of riding in a cab because he couldn't sit down in a cab (R. 75). This witness testified that during the insured's stay at home members of the family assisted him in shaving, dressing, and removing the brace and putting it back

on (R. 76). He further testified that the insured was changed considerably; that he was irritable and nervous, very touchy, and seemed to be bothered by everything; that he sat around the house with a stare on his face, frequently not answering until spoken to several times; that he seemed not to want to talk to anyone, and when talking his speech was rambling, and he would switch from one subject to another. He testified that the insured seemed to be unsociable, going down town only once in a while, and desiring to return home upon each occasion after about twenty minutes (R. 77–79).

The two other brothers and the sister testified substantially to the same effect regarding the appearance and conduct of the insured while he was home on furlough (R. 84–86, 88–89, 39–41).[4] As to whether he was suspicious of other people, the insured's brother, Francis, testified: "Yes, he was kind of funny that way" (R. 89). He explained, however, as follows:

> Q. * * * Now, did you notice any of those things when he was home there on the furlough?
>
> A. Well, when he was home on furlough, he was wearing the brace, you see, and he was sick.
>
> * * * * *
>
> Q. Did you notice that he kind of kept to himself?

[4] Some of the sister's testimony purported to relate also to the period after the insured's discharge from service in May 1920 (R. 40–41). It was ultimately developed, on cross-examination and redirect examination, however, that she did not see the insured after his discharge from service (R. 48–50), until a few weeks before the trial (R. 42).

A. Yes. He was in the house most of the time.

Q. Did he go out and associate with his friends?

A. No. When he was there at that time, it was winter and it was slippery, and whenever he would go any place, I would have to go with him to see that he would not fall down (R. 88–89).

A third brother, James, testified:

Q. Now, did you notice when he was home on the furlough that he was nervous and irritable?

A. He was not so much then, because he was—I would say he was ill then and spent a great deal of time in the bedroom in bed (R. 97).

The appearance and conduct of the insured upon his discharge from service in May 1919 were testified to on behalf of plaintiff by the insured's brothers, James and Francis, and his wife.

James testified that the insured was irritable, feeling that he was getting the worst of things; that he took no great interest in anything (R. 94); that his conversation slipped from one subject to another; that in general he was less sociable than before the War, having no real friends as he formerly had; and that there was a decided change in his feeling as to whether people were against him. He declined to agree, however, that there was an "entire" change in the insured's personality, testifying, "I would say there was a change in his personality" (R. 95). He also declined to agree that the insured was "suspicious of members of the family," testifying "I would not say he was suspicious, in those words * * * that he got the

worst of things * * * was the opinion that he expressed"[5] (R. 94).

Francis testified that after the insured returned from service he was irritable and awfully nervous and changed in manner, acting "funny, you know, and nervous," but was not irritable to the point of being unpleasant, "he was not so unpleasant" (R. 84). Pressed for an opinion as to whether the insured was sane or insane during the period of "about a year" (R. 83) after his return from service, this witness further testified:

> A. Well, does it have to be sane or insane?
>
> Q. Just answer the question, Mr. Mahoney.
>
> A. Well, of course, you know I would not know about that, because——
>
> Q. I asked you if you had an opinion, Mr. Mahoney.
>
> A. I think he was all right (R. 86).

The insured's wife testified that she was married to the insured on May 27, 1920, five days after his discharge from service; that she knew him before his enlistment, at which time he was in good health and employed as a bricklayer; and that she had kept in

[5] The testimony of this witness was taken by deposition on behalf of the defendant, and at the trial plaintiff introduced the cross-examination containing the testimony referred to in the text. On direct examination, later introduced by the defendant, the witness testified that when he returned from service the insured was "irritable and very nervous and quarrelsome." "I would say that it was due to the stress that he was in" (R. 320); but that he was personally neat and clean in appearance (R. 321). He testified that he had not formed an opinion as to whether the insured was mentally normal or abnormal (R. 322).

touch with him during his service. She testified that he was irritable, not as strong as he used to be, lighter in weight, and not really well; that he had a back injury that pained him at times (R. 31–33); and that for a period after his return from service he was employed by the Northern States Power Company, earning about $20.00 per week. (R. 34.)[6]

Plaintiff introduced the testimony of three witnesses, Abbott, Dooley, and Hennessy, who had been co-employees of the insured at the power company.

Abbott testified that he entered the employ of the company in February 1921, and was acquainted with the insured thereafter until the latter's resignation (R. 52). He testified that the insured was office boy, doing odd jobs around the office such as filing and making addressograph plates; that he was commonly known among the employes as "Dizzy Mahoney" (R. 53); that frequently he was found in some out of the way place, amusing himself by staring out of the window or playing with some small object, such as an eraser or a pencil; that he was peculiar in that he was

[6] The defendant called the custodian of the payroll records of the Northern States Power Company, who testified from the records that the insured was employed by that company from July 1, 1920 to December 31, 1921, under the title of office boy, and later clerk, for $75.00 per month. He received full pay for each of the months during that period, but the witness testified that no deduction would have been made for loss of time for a day or two because of sickness. He further testified that, while no records were available to show whether the insured lost any time in the year 1920, records for the entire year of 1921 showed that, during that year, the insured was absent on October 28, 29, and 31, and November 26 (R. 296–300).

by himself, didn't associate with fellow employees except to the extent that he did the work assigned to him, "and if you wanted him look for him and give him another job and he would complete that" (R. 54).

Dooley testified that he entered the employ of the company in October 1921 and was acquainted with the insured thereafter until the latter's resignation (R. 61). He testified that the insured performed the duties of office boy and some janitor's work such as cleaning up during the daytime and replacing light bulbs; that the work was distasteful to the insured, possibly regarded by him as being looked down upon and beneath his dignity; and that he came down to the storeroom, where the witness worked, "apparently to get away from that." He further testified that the insured seemed to be physically handicapped, and because he was an ex-service man "I probably sympathized with him"; that definitely he did not associate with other employees; and that he spent time in the basement or hiding in the vault so that the others could not find him (R. 63). He further testified that one Slocum, assistant superintendent, frequently engaged in heated argument with the insured which, on Slocum's part, was mostly kidding, or perhaps picking on the insured because he was easily picked on; that on one such occasion the manager told the insured, who weighed about 135 lbs., that he "had better lay off Slocum," who weighed about 250 lbs., and that the insured replied that "he would cut Slocum down to his size." This witness testified, further, that the insured thought Miss Brogan and Miss Tice,

employees of the power company, had a violent dislike for him and were trying to get his job or make life miserable for him (R. 64–65).

Hennessy testified that the insured worked, to a great extent, under his supervision; that he became acquainted with him through the American Legion and ex-servicemen's activities; that the Legion was then trying to find employment for everyone who had any connection with the War (R. 68–69); that the fact that the insured was an ex-serviceman had considerable to do with putting him to work and keeping him there; that the insured was an "aloner," frequently found staring out the window or into space; that he seemed to take a prejudice against certain people and was difficult to handle; that the insured was not discharged but left voluntarily, with a distinct feeling of relief on the part of the witness; and that, since the company rules are more stringent now than they were in 1920, he would not now hire a man of the insured's capacity as of 1920 (R. 70–72). Hennessy also testified, however:

> He came to work for us as a meter reader, and when he wasn't reading meters he was a general office man doing messenger or office-boy work, working on the addressograph and running errands, and various things of that kind. His work was satisfactory to a certain extent, but he had a peculiar temperament. My recollection is that anything I gave him to do, he would do; he was honest and conscientious. As soon as he had done what he was told to, he was hard to find; he would more or less leave the

office—not the building—you would have to go and find him.

* * * * *

Q. What would he be doing?

A. Just sitting and apparently thinking, kind of a blank expression on his face; but you would call him and he would be right back on the job again.

Q. Would you state as to the frequency of that hiding out?

A. I couldn't say. Of course, when he was reading meters, he would do a definite job at this. That would be about a week out of the month and then we would use him for a general office boy, and he wasn't around except when you went and found him.

Q. How about in reference to the accuracy of his work?

A. He was a very good meter reader. I don't recall any complaints about the accuracy (R. 69–70).[7]

---

[7] Two other co-employees at the power company, Nels Nelson and Blanche Callahan, were called by defendant. Nelson testified that the insured acted just like any ordinary man "Sometimes * * * a bit grouchy"; that as to nervousness and conversation, he appeared to be all right; that "we kind of would kid him a lot, you know, but I naturally do that with a bell hop anyway;" that he did his work satisfactorily and was efficient except for physical defects, but "outside of that, I couldn't say he was different from anybody else." He also testified that it was the custom of the company to start new employees in a position of the type held by the insured and give them a chance to work up to a better job (R. 304–306).

Miss Callahan testified that the insured worked in the same office with her, performing work for which the company always employed a person; that he seemed to perform his work satis-

The plaintiff introduced two medical reports of the insured's condition during the period of his employment at the power company. One was based upon an examination made on April 9, 1921. It discloses that his condition was then diagnosed as "Fracture of Vertebra Simple, 12th Dorsal 1st and 2nd Lumbar. Dislocation of Vertebra (Twelfth)" (R. 136). The prognosis was favorable. The report shows the examining physician's conclusion that the insured's physical and mental condition was such that vocational training was feasible, and "This man's condition is improving and with vocational training should be able to handle any clerical or similar work" (R. 136–137).

The other report was based upon an examination of the insured made on August 18, 1921. The diagnosis and prognosis were the same as that shown by the earlier report, except that the diagnosis contained the additional notation "Needs Dental Work" (R. 139). Again his physical and mental condition was found to be such that vocational training was feasible (R. 140).[8]

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factorily; and that she noticed no signs that he was mentally deficient (R. 307–308). The company records show that, promptly upon the insured's resignation, his position was filled (R. 301).

[8] The defendant introduced the testimony of Dr. McCammel, who made the examinations of April 9, and August 18, 1921. He testified, in effect, that no symptoms of nervous or mental abnormality were manifested at the time of either of these examinations (R. 343, 344, 348), and that on both occasions the insured's health was such that he was able to carry on the occupation of clerk, meter reader, janitor, or any light work "not entirely sedentary," not requiring too much heavy lifting or exertion (R. 343–344).

The insured apparently resigned his position with the power company to enter vocational training. It was testified that he resigned to go west (R. 308), and he in fact entered vocational training at Seattle, Washington, on January 9, 1922 (R. 141). It is shown by plaintiff's evidence that this training continued until May 8, 1924, with an interruption in January 1924 (R. 141), and that he completed a course in accounting (R. 171–172).[9]

The evidence of the insured's condition from 1922 to 1934, offered by the plaintiff, consists primarily of reports of medical examinations made during the interval between those dates and case history given by the insured and his wife, as recorded in reports of examinations made of the insured in 1932 and thereafter. In addition, plaintiff introduced lay testimony as to his appearance on a few short and widely separated occasions between 1922 and 1927.

The medical examination reports showed the following:

January 17, 1923. Diagnosis: Acute Rhinitis—Chronic catarrhal (R. 140).

January 18, 1924. No serious illness. No operations. Has had weakness in back (R. 141). Nervous System: Apparently normal (R. 143). Diagnosis: Fracture of spine. Ankylosis bony of spine. Atony (R. 143).

The insured was found to be unable to resume his prewar occupation on account of his spine, but his

[9] Records pertaining to his vocational training, introduced by defendant, likewise show that the period of vocational training was from January 9, 1922, to May 8, 1924 (R. 395–396).

physical and mental condition was found to be such that vocational training was feasible (R. 140–144).[10]

April 28, 1924. Complaint: "Stiffness and weakness in small of my back if I sit long at a time or walk very far. I am unable to do any lifting or hard work" (R. 147). "* * * complete rigidity of the spine involving the lower dorsals and the lumbar spine" (R. 148). "Nervous System: Negative" (R. 149). Diagnosis:

Fracture of spine.
Ankylosis bony of spine.
Atony muscles of back.
Atrophy muscles of back.
Curvature of spine (Kyphosis).
Curvature of spine (Scoliosis).
Hallux valgus.
Flat feet bilateral 1st degree.
Callosities.
Missing teeth, one.
Dental caries, two.
Gingivitis.
Astigmatism, compound, hyperopic.
Albuminuria (R. 150).

[10] Dr. Birchfield, one of three doctors who made the examination thus reported, was called by defendant. He testified: "There was no neuropsychiatric examination made. * * * The reason we didn't make one was this, because he gave us a very definite history in his own language, and it was so clear that there was no indication of any nervous or mental condition at that time, therefore he was not referred to a specialist" (R. 353). He also testified that the insured's health was such at that time that he was able to carry on the occupation of clerk, meter reader, janitor, bookkeeper, or any occupation that did not call for heavy manual labor (R. 353).

His physical and mental condition was found to be such that vocational training was feasible (R. 150).

February 11, 1925. No serious ilness since service (R. 151). Has had stiffness and weakness in back, with pains in loins after sitting for any length of time. Marked rigidity of the muscles of the spine with atrophy (R. 152). Nervous system normal (R. 153). Diagnosis: (See last diagnosis above—substantially the same.)

April 16–19, 1926. (Complete report, R. 154–160.) Complaint: "Pains thru back & hips when I sit down and get up—am all stiff." Diagnosis (R. 155). See last diagnosis above—substantially the same.

October 24 to November 1, 1932. Five or six convulsions in past year, causing unconsciousness. Exceptional condition, no other complaints. No treatment of any kind (R. 160). No hospitalization since discharge from service, but during past year four or five spells of some kind. The first one about a year ago (R. 163). "In the Mental Field, except for apprehension, and self-concern, nothing abnormal is elicited. He is quiet, pleasant, and cooperative" (R. 165). Epileptoid seizures strongly suggested by the history, but the findings do not warrant a diagnosis (R. 166). He was regarded by the examiners as competent (R. 168).[11]

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[11] Dr. Ernest, one of three doctors making this examination of the insured, was called by the defendant. He testified that the examination included complete neuropsychiatric examination—a study neurologically as well as mentally—and that there was nothing definite for any diagnosis in the neuropsychiatric field (R. 375). He further testified: "His mental condition at that time was perfectly normal except that he was somewhat

Reports of medical examinations made of the insured in 1934 and thereafter, introduced by the plaintiff, contain recitations of the case history as given by the insured and his wife. The history is to the effect that subsequent to completion of his vocational training in May 1924 the insured engaged in occasional odd jobs of bookkeeping, but was not otherwise gainfully employed; that he had been unable to do work requiring any great amount of strength because of his back injury; that he had lived on his compensation, plus his wife's earnings, and had squandered what little money he had in "gambling and dancing"; that seizures started over five years prior to the date of the examination (April 5, 1934),[12] at first occurring only

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apprehensive and was worried and self-concerned. * * * Then the thing that really mentally was bothering him was, he had told me that for the past year he had been having some kind of spells in which he would fall. * * * That was the real reason for his coming in. He was somewhat worried about these spells" (R. 376). He testified further: "His reactions I thought were pretty normal" (R. 380). "I didn't find anything in any examination to indicate that he didn't know exactly what he was doing. I think the evidence we have right here in the report is even better than opinion because he is clear in his understanding of what I wanted him to do and he gave a very good reason why he didn't want a spinal puncture, and certainly he would be able to know whether he had rights as an ordinary citizen would know them" (R. 381).

[12] In earlier statements regarding his attacks, given contemporaneously with the first medical consultation concerning them, it had been reported that the first attack occurred about October 1931 (R. 160, 163, 376; and see reference to medical examination of October 24 to November 1, 1932, *supra*.) The discrepancy in dates may be due merely to a fading of memory with the passage of time, or it may represent a belated belief by the insured's wife that he had mild attacks for a time be-

two or three times a year, but becoming more frequent during the past two years (R. 172). Aside from the seizures, it was reported by his wife, his back had bothered him a great deal, "although he had been fairly well physically," and during the last few years he became more irritable and quarrelsome, and commenced drinking to the point of becoming intoxicated. While intoxicated, he was especially quarrelsome and abusive to his wife (R. 173).

Subtantially the same history, recorded on another occasion in April 1934, contains the additional recitation that:

> There has also been an increasing irritability and antagonism toward his family. He has become somewhat careless in his appearance and habits and while formerly he was more or less sociable, of late years he has been inclined to be seclusive, staying by himself, frequenting pool halls and gambling houses. At one time he thought that his wife was untrue to him and the history shows that his own morals are not above reproach (R. 176).

On another occasion in 1934 it was recorded:

> The wife states that approximately ten or twelve years ago she noticed a decided change in his personality, that he was *beginning* to be irritable and fault finding. She states that he would wake up in the morning in a dazed condition. The wife said that the first seizure occurred approximately five or six years ago, but she thinks

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fore she became aware of them. Both of these possibilities are suggested by the evidence referred to in the two next succeeding paragraphs of the text.

he must have had them before from the way he acted (R. 178).

At the trial, the insured's wife testified that he had his first seizure about 1925, "or around in there. I am not very good at remembering dates," but that they were not frequent until after 1932 (R. 35, 36). She also testified that the insured has seizures now, is older, and not as strong as in 1920, and that otherwise his condition then and at the time of trial was the same (R. 33–34).

Francis Mahoney testified that he saw the insured once or twice about 1927 and that his condition was about the same then as it was in 1920 (R. 90–91). (As earlier pointed out, this witness, interrogated as to whether the insured was sane or insane in 1920, had testified, "I think he was all right" (R. 86).)

James Mahoney testified that he saw the insured occasionally in 1923 and a few times during a two-week visit in 1927, and that he thought his condition was practically the same on each of those occasions as it was in 1920 (R. 322–323). (As earlier pointed out, this witness had declined to characterize the insured as "suspicious of members of the family" in 1920 (R. 94); had likewise declined to agree with counsel that there was an "entire" change in the insured's personality during his military service (R. 95); and had not formed an opinion as to whether the insured's condition was normal or abnormal (R. 322).) [13]

[13] Defendant called three lay witnesses who had been acquainted with the insured during the period from 1922 to 1931. George Dunlap testified that he was the manager of an apartment house in which the insured and his wife lived from De-

The plaintiff introduced a number of reports of medical examinations of the insured, made in 1934 and thereafter, tending to show that mental deterioration by reason of epilepsy manifested itself as early as March 1934, with psychosis as early as October 10, 1935. Plaintiff also introduced a record of certain state court proceedings reflecting that the insured was found to be incompetent in March 1934.

The medical examination reports show that mental diagnoses of the insured's condition were made as indicated below. Of course, the spinal condition was diagnosed also, and minor conditions, such as absence of teeth, deviation of nasal septum, and flat feet were noted. It seems unnecessary to repeat these physical diagnoses here.

March 10, 1934. Epileptic deterioration (R. 293). (Dr. Evans, who made this diagnosis, was called by plaintiff. His testimony, pertaining, in part, to the distinction between mental deterioration and insanity, is summarized later.)

April 5 to June 10, 1934. (Hospital observation.) Epilepsy, petit mal (R. 130). A report of a single complete examination made during this period (R. 169–

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cember 1922 to May 1924; that he saw the insured frequently and talked with him occasionally; that he was neat and clean in appearance; that he acted just like anyone else, there being nothing peculiar in his conduct; and that, in his opinion, the insured was sane (R. 311–314).

Mrs. Peter Swanson testified that the insured lived in her house from 1924 to 1930; that he drank excessively at times (R. 330), but as a rule he appeared to be normal (R. 332).

Edgar Williams testified that he knew the insured and saw him during the years of 1929 to 1931; and that he observed nothing mentally wrong or abnormal about him (R. 332–333).

179) shows a diagnosis of epilepsy with deterioration from history. The final diagnosis of epilepsy petit mal is explainable, we assume, upon the grounds that during the time he was in the hospital he was considered competent (R. 179, 181, 179); that as the report reflects, he had no seizure from March 9 until May 25, 1934 (R. 177, 183); and that two attacks on May 25 and 26 were light, petit mal in character (R. 182, 183). Also, he was found to be neat in personal appearance, quiet, cooperative, pleasant and congenial, and he showed no evidence of active psychosis (R. 183).

October 10, 1935. (Single examination.) Epilepsy Grand and Petit mal, with psychotic episodes, psychotic at this time (R. 183). (This diagnosis was made by Dr. Ernest who, as earlier pointed out, participated in the examination of the insured in October and November 1932, and who testified that no mental abnormality was manifested in 1932 (R. 380); and that in his opinion the insured then knew exactly what he was doing, just the same as any ordinary citizen (R. 381)).

October 11, 1935–January 17, 1936. (Hospital observation.) Psychosis, epileptic deterioration (R. 130, 147).

February 29 to May 11, 1936. (Hospital observation). Psychosis, epileptic deterioration (R. 131.)

October 29 to November 5, 1937. (Hospital observation.) Psychosis, epileptic deterioration (R. 131, 215.) (Dr. Ernest also made the neuropsychiatric examination at this time (R. 212.) As to the difference between the insured's mental condition in 1932 and 1937,

he testified: "In the first one there was no evidence of any mental change, and in the last one he is definitely psychotic, with deterioration." As to that psychotic condition, he testified: "* * * it isn't difficult for anyone to note it. As a matter of fact, the psychoses are usually diagnosed by the family of the patient and the ordinary physician" (R. 384).)

On each of a number of occasions thereafter, until June 1939, the same mental diagnosis was made by Veterans' Administration doctors (R. 132–133), and Dr. Finley, plaintiff's witness, testified that he found the insured to be of unsound mind upon examination of him on December 9, 1942 (R. 265, 266). (But see Dr. Finley's explanation of what he meant by unsound mind (R. 275), and summary of his testimony, *infra.*)

The plaintiff introduced the record of certain proceedings had in the Circuit Court for the State of Oregon, showing that the insured was adjudged to be incompetent on March 9, 1934 (R. 281–291). That adjudication seems to have been based substantially, if not entirely, upon the findings of a physician who examined him on behalf of the court on the date of the adjudication (R. 285–288).[14]

The plaintiff introduced the testimony of Dr. Evans, who had diagnosed the insured's condition as epileptic deterioration on March 10, 1934 (R. 283). He

[14] Since July 3, 1931, is the latest date upon which the competency or incompetency of the insured has significance in the present case, careful consideration of the evidence relating to 1934 and thereafter is not regarded as necessary, and the Government, therefore, does not deny that the evidence would support a finding that he was incompetent from March 1934.

defined epileptic deterioration as a disease affecting the central nervous system, characterized by the typical convulsion and a change of character to the extent that the patient becomes more or less irritable and hard to get along with, and testified that in severe cases the patients become more or less impaired in mind, becoming "unable to put out the brain work they formerly did" (R. 238). He testified that he would consider the insured as insane, "mentally sick," at the time of his examination of him (R. 238), explaining that deterioration is a mental illness," but it is not psychotic" (R. 247); that deterioration alone, aside from psychiatric disturbance, would not constitute insanity, but that the insured manifested such disturbance on March 10, 1934 (R. 263).

Considering a hypothetical question embracing the plaintiff's version of some of the evidence (R. 240–242),[15] Dr. Evans testified to an opinion that the in-

[15] This question omitted reference to very substantial portions of plaintiff's own evidence, particularly the findings and absence of findings shown in the numerous medical reports of the insured's condition, both during and after his military service, tending to show that the insured had no nervous or mental disability. Since any opinion based upon the question would have been devoid of probative value unless the jury found the facts of the case to be in accord with those in the question, it would seem that counsel for plaintiff hoped that the jury would discredit all of the medical findings introduced by plaintiff. In view of the manner in which Dr. Evans answered the question, no point need be made of it, but in passing, doubt is expressed as to whether the jury might have been permitted to repudiate all the testimony of the plaintiff unfavorable to it, as would be necessary in order to attribute probative value, favorable to the plaintiff, to any answer to the hypothetical question.

sured's condition, as found in 1934, was the end results of his injury in 1918, explaining: "I would put it this way, that had that injury not occurred he would not have had his epilepsy, * * * I don't believe that any man is wise enough to say just when the mental involvement did actually start" (R. 244–245). He further testified that epileptic seizures due to trauma do not usually follow closely upon the injury, but generally occur some two or three years later (R. 253); that in his opinion, based upon the hypothetical question, deterioration has existed from some time prior to 1934 (R. 247), not "right from the start, but the deterioration was the end result of his change of character" (R. 255).

Distinguishing between deterioration and insanity or psychosis,[16] Dr. Evans testified that the information given him in the hypothetical question, plus that obtained upon his examination of the insured in 1934, provided the basis for nothing better than a guess as to when the insured became psychotic, and he repeatedly declined to express any opinion in that respect.[17]

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[16] In framing questions, counsel usually employed the term insanity, while the doctor answered by use of the term psychosis. Presumably the doctor regarded the word psychosis as more definitely descriptive of the condition constituting insanity in the medical sense. Compare the medical statement as to the meaning of insanity (R. 276).

[17] An opinion as to the insured's sanity or insanity was sought as to a number of different dates by resort to several variations of the question. To avoid the duplication, in effect, involved in referring to each instance separately, only typical answers are set forth here.

Thus, as to whether the insured was insane in May 1920, he testified that the hypothetical question would indicate something radically wrong with his mind (R. 244), but "there is a difference between being deteriorated and having a psychosis or being insane * * * On May 22, 1920, he might have had some deterioration and at the same time not be frankly insane or frankly psychotic. It is impossible for me to say" (R. 246). With respect to 1925, he testified: "I contend that he was deteriorated from an early date, but whether he was frankly psychotic in 1925 would be a wild guess on my part. I don't know" (R. 249). With respect to the year 1930, he testified "Again I will have to answer this last question the same as I did the prior one. I don't know", and after the question had been amended he continued:

> I would say that the changing personality, that he was a different man than he was formerly, leads me to conclude that for several years prior to the time that I examined him he was deteriorated and impaired in mind, but I am not wise enough to say when he had these delusions of persecution—when those things started in I don't know, and if you would ask me the question as to whether or not I *though* he was insane in 1933, again I don't know. It is a matter of opinion, and if I answered it I would have to guess. I am basing my answers on my experience in head injury cases. I am contending all along the man was injured mentally, that some damage certainly was done him, or he would not have developed this condition from which he still suffers, but whether he was

> frankly insane or not in those earlier years I just can't say (R. 250–251).

The plaintiff called Dr. Finley, who, upon the basis of a hypothetical question including the findings made by the witness upon examination of the insured on December 9, 1942 (R. 267–268),[18] testified:

> That in January, 1920, this man was at that time mentally ill, that is, the illness that he presented at the time I saw him was in existence at that time.
>
> Q. In your opinion would that individual be of an unsound mind at that time? A. Yes (R. 269).

On cross-examination, he testified that his opinion was based, in substantial part, upon the history of the case, obtained in connection with his examination in December 1942, and reflected by Veteran' Administration records, which he had examined, as well as the hypothetical question (R. 271, 273), and further testified:

> Q. You have given your opinion, Doctor. I am asking for the basis of it. What is there in the hypothetical question or in any information contained in the file or any information given by this man at this trial that indicates to you the condition of this man's mind from 1927 to 1934?

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[18] The considerations stated in footnote No. 15, *supra*, p. 27 are also applicable to this question. Moreover, the question to Dr. Finley required an assumption that the condition in 1920 was the same as that found by the doctor upon examination in 1942 and, in effect, therefore merely asked the doctor's opinion as to the condition which he found.

A. I know of none.

Q. And yet you continue to express your opinion that he was in that period of unsound mind?

A. That is my opinion.

Q. Doctor, what do you mean by "unsound mind"?

A. I mean by "unsound mind" an alteration either in the man's judgment, behavior, memory, or emotional reactions, one part of all of these things.

Q. Is unsound mind synonymous with insanity?

* * * * *

A. The term "insanity" is not a term that is used a great deal in medicine. It is a term that has a very loose meaning and it depends upon your definition of insanity whether it is synonymous with an unsound mind. If you mean by insanity any alteration in the personality, in the way of judgment, emotional reaction, behavior, memory, than it is. If you mean by insanity, as it is often used, that it is a severe type of emotional breakdown or mental deterioration, then it is a severe type of unsound mind (R. 275–276).

ANALYSIS OF THE EVIDENCE

The evidence in this case may be harmonized only with the view that the insured was neither totally permanently disabled prior to August 31, 1920, nor insane prior to July 3, 1931; that at least until 1934 his condition was, as concluded by Dr. Finley, nothing more than an "alteration" either in his "judg-

ment, behavior, memory or emotional reactions" (R. 275). All of the medical evidence, all of the lay testimony and record evidence concerning his pursuit of substantially gainful employment, and the conclusions drawn by lay witnesses from the symptoms to which they testified, tend to show the absence of total permanent disability and insanity as of the critical dates.

There remains only the testimony of lay witnesses to the effect that the insured was, upon specified occasions, nervous, irritable, and nonsociable, and that his conversation was rambling. That testimony was given from memory more than twenty years after the time to which it referred, and must be evaluated in the light of the facts, judicially recognized, that memories fade with the passage of time, and that dates and other details depending upon unaided recollections after the passage of years are uncertain. *Galloway* v. *United States,* 130 F. (2d) 467, 470 (C. C. A. 9), affirmed, — U. S. — (October Term, 1942, May 24, 1943, as yet unreported; *Cunningham* v. *United States,* 67 F. (2d) 714, 715 (C. C. A. 5); *United States* v. *Earwood,* 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 763; *United States* v. *Brown* 76 F. (2d) 352, 353 (C. C. A. 1).

Moreover, the lay testimony as to the insured's abnormal conduct describes only such symptoms as would ordinarily be regarded as normal incidents of the insured's long period of convalescence from physical injury. It is clear that the symptoms were most noticeable when the insured was home on furlough, months before he was sufficiently improved to be re-

leased from service. They were less noticeable when he was discharged from service in May 1920 at a time when, although his condition had improved, maximum recovery had not been attained. They seem to have been absent almost entirely after January 1922.

The symptoms observed at the time of the furlough were plainly regarded by the witnesses as temporary incidents of his physical illness. He "kind of kept to himself" because he was required to stay in the house most of the time (R. 88–89), "a great deal of the time in the bedroom in bed" (R. 97). Interrogated as to whether, at the time of the furlough, the insured was nervous, changed, and "funny," his brother, Francis Mahoney, volunteered the explanation: "A. Well, when he was home on furlough he was wearing a brace, you see, and he was sick" (R. 88).

The insured's brothers, James and Francis, who had seen him at the time of his furloughs, testified that he was also nervous, irritable, changed, and "funny" at the time of his discharge from service. Since they declined, however, to characterize him at that time as insane (R. 86, 321), entirely changed (R. 95), suspicious of members of his family (R. 94), or unpleasant (R. 84), it is plainly inferable that, to the best of their recollections, his symptoms were less noticeable in May 1920 than they were in the preceding January. James testified, in effect, that the insured had not fully recovered from his back injury at the time he returned from service, and that his nervousness then, as at the time of his furlough in January, was merely a temporary incident of his

convalescence. As to whether he was irritable or nervous in May 1920, he testified, "I would say it was due to the stress that he was in" (R. 320).

The testimony of the insured's wife has special significance in this respect. Apparently she did not see him when he was home on furlough; at least her testimony was confined to the period after his discharge from service in May. She referred principally to his physical injury at the time he returned from service, making only slight reference to nervous symptoms (R. 32–33). It is plainly inferable on the one side that her recollection was free from any confusing impression regarding the more noticeable symptoms manifested at the time of the furlough (attributable to the severe physical disability then existing) and, on the the other, that, in the minds of James and Francis, there was some failure to distinguish, after so many years, between January and May 1920. This is an example of the character referred to by this court in *Galloway* v. *United States, supra,* of the danger of confusing later conditions with earlier ones when resort is had to unaided recollections of occurrences long past.

It is significant, moreover, that the testimony of the insured's wife, who was in a better position than anyone else to know the facts during that period, was not elicited as to the existence or nonexistence, during the decade following his discharge from service, of symptoms of the character noticed by lay witnesses in January 1920. Compare *Galloway* v. *United States, supra,* and consider the testimony of lay witnesses for defendant to the effect that, during that period, the

insured appeared to them to be entirely normal (R. 311–314, 332–333). In giving the history of her husband's condition in 1934 (plaintiff's evidence), the wife stated that he had become more irritable and quarrelsome in recent years (R. 173), and that about ten or twelve years before 1934 he was only "beginning to be irritable and fault finding" (R. 178).

Finally, however—and we submit this alone is decisive against the plaintiff—the witnesses who described the insured's mental and nervous symptoms even during the furlough periods in 1919 and 1920 did not regard them as manifestations of a serious abnormality. One had no opinion as to whether the insured was sane or insane (R. 321), and another thought that he was sane (R. 86). He was not regarded by those closely associated with him as "entirely" changed, suspicious, or unpleasant (R. 84, 94, 95). Whatever inferences might be permitted to be drawn under other circumstances from such general terms as nervousness, irritability, rambling speech, and unsociability, it is plain here that they were intended to describe only eccentricities of conduct, falling short of mental derangement. In its ultimate effect, that is, this lay testimony regarding nervous and mental symptoms was intended by the witness to describe at most only an alteration in judgment, behavior, memory, or emotional reactions.

In addition, evidence showing that the insured was gainfully employed and thereafter followed a course of vocational training, aggregating nearly four consecutive years from July 1920 to May 1924, established conclusively that he was not totally permanently disabled

on or prior to August 31, 1920. Vocational training successfully pursued has been regarded as the equivalent of successful pursuit of a gainful occupation. *United States* v. *Kerr,* 61 F. (2d) 800, 802 (C. C. A. 9); *Nichols* v. *United States.* 68 F. (2d) 597, 598 (C. C. A. 9); *Blair* v. *United States,* 47 F. (2d) 109, 111 (C. C. A. 8).

On the issue of total permanent disability, the present case is governed, we submit, by the decision of this court and of the Supreme Court in *Galloway* v. *United States, supra.* In that case this court held that proof that the veteran had served in the Navy and the Army conclusively refuted any claim of earlier existing total permanent disability, and it characterized as a failure in the plaintiff's case the lack of any evidence of the veteran's condition over a period of ten years from 1922. The Supreme Court rested its decision upon the latter ground, without decision as to the former. In the present case, the insured's work for the power company and his vocational training are, at least, the equivalent of the Army and Navy service in the *Galloway* case. In the present case, there is an absence of evidence favorable to the plaintiff regarding the decade from 1922 equal to that in the *Galloway* case. In the present case, moreover, there is some evidence relating to that period, all of which tends to show the absence of total permanent disability.

The character of the evidence in the present case regarding the period between 1922 and July 3, 1931, is decisive against the plaintiff also on the issue of insanity as of the latter date. Witnesses who did not

regard the insured as insane in 1920 testified that he appeared to be about the same in 1923 and 1927. There is literally no other evidence to show that the insured's conduct or condition was abnormal in any respect between 1922 and July 3, 1931, when the right of suit upon his policy became barred, unless he was then an "insane person." And there is plainly no evidence to show insanity of the character required to avoid the bar of limitations. The term "insane," when used to describe persons excepted from the bar of limitations upon the bringing of suit, means mental derangement bearing a causal relationship to the failure to bring suit. *Clark* v. *Irwin,* 88 N. W. 783, 785–786; 63 Nebr. 639; *Cathcart* v. *Stewart,* 142 S. E. 498, 502; 144 S. C. 252. In the latter case it was stated:

> It is well settled that a man may be insane on one subject, but capable of transacting business on all others. There may be a partial derangement; yet capacity to act on many subjects may exist. The question in any case is not merely whether the party was insane at the time of the questioned transaction, but whether he was so insane as to be incapable of doing the particular act with reason and understanding.

See also: *United States* v. *Kiles,* 70 F. (2d) 880, 883 (C. C. A. 8).

There is no evidence in the present case to show that the insured was mentally disabled prior to July 3, 1931, to act intelligently with respect to his right to sue upon his insurance. Certainly mere alteration of the character attributed to the insured by Dr. Finley does not constitute such disability.

CONCLUSION

It is respectfully submitted that there is no substantial evidence to show that William V. Mahoney was totally permanently disabled on August 31, 1920, or insane on July 3, 1931, and that, accordingly, the judgment should be reversed with instructions to enter judgment for the Government.

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UNITED STATES OF AMERICA, APPELLANT

v.

PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

BRIEF FOR THE APPELLANT

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CITATIONS

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10458

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JURISDICTION

This is an appeal by the United States from a judgment against it for the proceeds of a policy of yearly renewable term insurance.

Whether the District Court had jurisdiction is one of the questions presented by the appeal for decision by this court. The governing statute is Section 19 of the World War Veterans' Act (38 U. S. C. 445), and the jurisdictional question is whether the suit was brought within the time prescribed in that section. Otherwise, compliance with the statute, and hence jurisdiction, is not denied.

The jurisdiction of this court is conferred by 38 U. S. C. 445 and 28 U. S. C. 225. The judgment appealed from, entered on December 14, 1942 (R. 19),

became final upon denial, on February 1, 1943 (R. 22–23), of defendant's motion for judgment notwithstanding the verdict, or for a new trial (R. 20–22). Notice of appeal was filed on April 23, 1943 (R. 23–24), within the time provided in 28 U. S. C. 230.

STATEMENT

A policy of yearly renewable term insurance was issued to William V. Mahoney on December 7, 1917, and premiums were paid upon it until August 1, 1920. Protection under the policy expired on August 31, 1920, at the expiration of the grace period for payment of the premium due on the first day of that month (R. 10). Twenty-one years later, July 28, 1941, a claim for benefits under the policy was filed in the Veterans Administration, alleging that the insured became totally permanently disabled while the policy was in force. The claim was denied on November 3, 1941 (R. 10), and this suit was brought on November 19, 1941 (R. 2).

In an effort to avoid the bar of limitations, which otherwise would have fallen on July 3, 1931 (Section 19 of the World War Veterans' Act, *infra*), plaintiff alleged in its petition that the insured had been insane and incompetent continuously since May 22, 1920, and that he was rated by the Veterans Administration as insane and incompetent prior to July 3, 1931 (R. 4). In its answer, the Government denied the alleged occurrence of total permanent disability while the insurance was in force (R. 7), and likewise denied the allegations with respect to insanity and incompetency (R. 8).

Pursuant to pretrial agreement, the case was tried upon the issues of whether the insured was insane, or was rated by the Veterans' Administration as insane, on or prior to July 3, 1931,[1] and whether he became totally permanently disabled on or prior to August 31, 1920 (R. 11). A jury trial on these issues resulted in a general verdict for the plaintiff (R. 15), in addition to affirmative answers by the jury to special interrogatories as to whether the insured was insane on July 3, 1931,[2] and totally permanently disabled while his insurance was in force (R. 17). The judgment appealed from (R. 16–19) rests upon that ver-

[1] It may reasonably be doubted that insanity on this date would bring the case within the statutory exception. The limitations provision most favorable to plaintiff was enacted on July 3, 1930, providing that no suit would be allowed unless brought within one year from that date. As enacted on that date, the statute provided "insane persons * * * or persons rated as incompetent or insane by the Veterans' Administration shall have three years in which to bring suit after the removal of their disabilities." If the statute is interpreted as speaking as of the date of its enactment, as the language clearly warrants, it would mean persons who were then insane, that is on July 3, 1930. That view accords with the rule, usually governing exceptions in statutes of limitations in favor of persons under legal disability, that the exception is not applicable to disabilities arising after the limitations period had commenced to run. *DeArnaud* v. *United States*, 151 U. S. 483, 496; *Harris* v. *McGovern*, 99 U. S. 161, 167–168. However, the evidence with respect to July 3, 1930, is substantially the same as that relating to July 3, 1931, and hence, for the purpose of this appeal, the issue as made in the District Court may be accepted without prejudice to either party in this particular case.

[2] At the trial there was no evidence whatever relating to an administrative rating of the insured as incompetent prior to July 3, 1931, that contention apparently being abandoned entirely.

dict and, in this court, reversal of it is sought upon the ground that there is no substantial evidence to support a finding for plaintiff on either of the issues tried. The points were raised in the court below by the Government's motions for dismissal and for a directed verdict at the close of all the evidence, and its post-verdict motion for judgment, all of which were denied (R. 396–397, 19–23).

QUESTIONS PRESENTED

1. Whether there is any substantial evidence to show that William V. Mahoney was an "insane person," within the meaning of Section 19 of the World War Veterans' Act (38 U. S. C. 445), on July 3, 1931.

2. Whether there is any substantial evidence to show that William V. Mahoney was totally permanently disabled on or prior to August 31, 1920.

PERTINENT STATUTES AND REGULATIONS

The contract sued upon was issued pursuant to the provisions of the War Risk Insurance Act of October 6, 1917, and insured against death and permanent total disability (c. 105, 40 Stat. 398, 409; 38 U. S. C. 511) occurring during the life of the contract.

Section 13 of the War Risk Insurance Act (c. 105, 40 Stat. 399; 38 U. S. C. 426) provided that the Director of the Bureau of War Risk Insurance—

> shall administer, execute, and enforce the provisions of this Act, and for that purpose have full power and authority to make rules and regulations, not inconsistent with the provisions of this Act, necessary or appropriate to carry out its purposes, * * *.

Pursuant to this authority, there was promulgated on March 9, 1918, Treasury Decision No. 20, reading, in pertinent part, as follows:

> Any impairment of mind or body which renders it impossible for the disabled person to follow continuously any substantially gainful occupation shall be deemed * * * to be total disability.
>
> Total disability shall be deemed to be permanent whenever it is founded upon conditions which render it reasonably certain that it will continue throughout the life of the person suffering from it. * * *

Section 19 of the World War Veterans' Act, as amended July 3, 1930 (c. 849, sec. 4, 46 Stat. 992; 38 U. S. C. 445), provides, in pertinent part, as follows:

> No suit on yearly renewable term insurance shall be allowed under this section unless the same shall have been brought within six years after the right accrued for which the claim is made or within one year after the date of approval of this amendatory Act, whichever is the later date, * * *: *Provided,* That for the purposes of this section it shall be deemed that the right accrued on the happening of the contingency on which the claim is founded: *Provided further,* That this limitation is suspended for the period elapsing between the filing in the bureau of the claim sued upon and the denial of said claim by the director. Infants, insane persons, or persons under other legal disability, or persons rated as incompetent or insane by the bureau shall have three years in which to

bring suit after the removal of their disabilities. * * *

ARGUMENT

Plaintiff's own evidence conclusively refutes its claims that the insured was totally, permanently disabled on or before August 31, 1920, and that he was insane on or before July 3, 1931

Plaintiff's evidence establishes that the insured recovered from an injury to his back, sustained in November 1918, and that after such recovery he was able to perform work of any character not involving heavy lifting or other strenuous physical exertion. So far as physical disability is concerned, the evidence establishes so plainly that he was able to work that we assume that no contention will be made to the contrary. At least, plaintiff's evidence shows that the insured worked regularly over a period of eighteen months subsequent to the lapse of his insurance, and that immediately thereafter he followed a course of vocational training for more than two years, and there seems to have been no evidence even intended to show that he was not physically able to carry on those undertakings.

Lay witnesses for plaintiff testified, in effect, that during the period of hospital treatment for his back injury the insured became nervous, irritable, and nonsociable; that his speech became rambling; and that such conditions continued over an indefinite period after his discharge from the service. The same witnesses declined, however, to characterize his condition as insanity, and the plaintiff's medical evidence establishes that he was not afflicted with a mental disability

of any character affecting his judgment or ability to work.

One of the plaintiff's two expert witnesses declined to express an opinion that the insured was insane at any time prior to 1934, upon the ground that available information (facts recited by plaintiff's counsel in a hypothetical question) provided a basis for nothing better than a "wild guess." Plaintiff's other medical expert testified that, in 1920 and thereafter until 1934, the insured was mentally ill, of unsound mind, by which he meant only that his "judgment, behavior, manner, or emotional reactions, one part of all of these things," were altered.

Finally, it is established by the plaintiff's evidence that long subsequent to the lapse of his insurance the insured became afflicted with epilepsy, possibly causing light attacks, not recognized as attacks by the insured or his wife, as early as 1925, but not manifesting itself in an attack of unconsciousness until October 1931, and not attended by any psychosis until after November 1932.

SUMMARY OF THE EVIDENCE [3]

Plaintiff introduced the official records of the insured's military service showing that he was a laborer by occupation, 21 years of age at the time of his enlist-

[3] The plaintiff introduced the Government's pretrial Exhibit No. 1, consisting of the Government's medical records pertaining to the insured, as well as certain depositions taken by the Government and, hence practically the whole of the evidence was introduced by the plaintiff. Accordingly, the text of this summary is devoted to a statement of the plaintiff's evidence, with references to the evidence introduced by the defendant restricted to footnotes and parenthetical statements.

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ment on July 15, 1917, and that he was discharged on May 22, 1920 (R. 100). These records show that on November 11, 1918, three sacks of potatoes fell upon the insured's head (R. 103), causing simple fracture of a number of his vertebrae, apparently, the 10th, 11th, and 12th dorsal (R. 107–108, 109), and deviation of the 1st, 2nd, and 3rd lumbar, and possibly the 9th dorsal, (R. 119, 121). There was no injury to the spinal cord (R. 128).

On the date of the injury, a laminectomy was performed and in February 1919 a cast was applied (R. 114). In the summer of 1919, he was supplied with a brace to support his back (R. 115). Hospital treatment for him continued from the time of his injury to the date of his discharge from the service, with the exception of two furloughs from October 30, 1919, to January 10, 1920 (R. 110), and January 17 to 24, 1920 (R. 111).

With a cast or brace, he was able to sit up and walk about (R. 118), although unable to help himself in such matters as getting up and down, dressing or wrapping his leggings (R. 114, 116, 118, 128). The records contain a note that on April 7, 1920, he was "walking without a brace and he walks better" (R. 116). An absence of pain was noted as of August 22 (R. 124) and September 30, 1919, and on the latter date it was recorded that he "Eats & sleeps well" (R. 118). On February 28, 1920, extreme nervousness, bordering on hysteria, was noted (R. 119), but the Army records make no reference to nervousness on any occasion either before or after February 28, 1920.

Upon his own application (R. 102), he was discharged from service before the maximum improvement was obtained. Upon careful consideration of the evidence obtainable, including a critical examination of the insured, a board of medical officers found his disability at that time to be absence of motion in lower dorsal and lumbar region left, with marked scoliosis. The board estimated his disability as 80% for his prewar occupation of laborer (R. 103).

In 1919 or 1920, or both, the insured spent some time at home by reason of the death of his father. His service records show that both of his furloughs (October 30, 1919, to January 10, 1920, and January 16 to 25, 1920), were on account of the death of his father. Some of the lay witnesses testified that he was home on furlough in 1919, and others fixed the time as 1920. It is fair to assume, we believe, that he was home on both occasions.

A number of lay witnesses (three brothers and a sister of the insured) were called by plaintiff to describe his condition while he was home on furlough.

John H. Mahoney testified that when the insured returned home he met him at the train, finding him bent over and crippled, and wearing a brace around his body to support his back (R. 76); that the insured said his back hurt him; that he appeared to be in pain; and that he walked home instead of riding in a cab because he couldn't sit down in a cab (R. 75). This witness testified that during the insured's stay at home members of the family assisted him in shaving, dressing, and removing the brace and putting it back

on (R. 76). He further testified that the insured was changed considerably; that he was irritable and nervous, very touchy, and seemed to be bothered by everything; that he sat around the house with a stare on his face, frequently not answering until spoken to several times; that he seemed not to want to talk to anyone, and when talking his speech was rambling, and he would switch from one subject to another. He testified that the insured seemed to be unsociable, going down town only once in a while, and desiring to return home upon each occasion after about twenty minutes (R. 77–79).

The two other brothers and the sister testified substantially to the same effect regarding the appearance and conduct of the insured while he was home on furlough (R. 84–86, 88–89, 39–41).[4] As to whether he was suspicious of other people, the insured's brother, Francis, testified: "Yes, he was kind of funny that way" (R. 89). He explained, however, as follows:

> Q. * * * Now, did you notice any of those things when he was home there on the furlough?
>
> A. Well, when he was home on furlough, he was wearing the brace, you see, and he was sick.
>
> * * * * *
>
> Q. Did you notice that he kind of kept to himself?

[4] Some of the sister's testimony purported to relate also to the period after the insured's discharge from service in May 1920 (R. 40–41). It was ultimately developed, on cross-examination and redirect examination, however, that she did not see the insured after his discharge from service (R. 48–50), until a few weeks before the trial (R. 42).

A. Yes. He was in the house most of the time.

Q. Did he go out and associate with his friends?

A. No. When he was there at that time, it was winter and it was slippery, and whenever he would go any place, I would have to go with him to see that he would not fall down (R. 88–89).

A third brother, James, testified:

Q. Now, did you notice when he was home on the furlough that he was nervous and irritable?

A. He was not so much then, because he was—I would say he was ill then and spent a great deal of time in the bedroom in bed (R. 97).

The appearance and conduct of the insured upon his discharge from service in May 1919 were testified to on behalf of plaintiff by the insured's brothers, James and Francis, and his wife.

James testified that the insured was irritable, feeling that he was getting the worst of things; that he took no great interest in anything (R. 94); that his conversation slipped from one subject to another; that in general he was less sociable than before the War, having no real friends as he formerly had; and that there was a decided change in his feeling as to whether people were against him. He declined to agree, however, that there was an "entire" change in the insured's personality, testifying, "I would say there was a change in his personality" (R. 95). He also declined to agree that the insured was "suspicious of members of the family," testifying "I would not say he was suspicious, in those words * * * that he got the

worst of things * * * was the opinion that he expressed"[5] (R. 94).

Francis testified that after the insured returned from service he was irritable and awfully nervous and changed in manner, acting "funny, you know, and nervous," but was not irritable to the point of being unpleasant, "he was not so unpleasant" (R. 84). Pressed for an opinion as to whether the insured was sane or insane during the period of "about a year" (R. 83) after his return from service, this witness further testified:

> A. Well, does it have to be sane or insane?
> Q. Just answer the question, Mr. Mahoney.
> A. Well, of course, you know I would not know about that, because——
> Q. I asked you if you had an opinion, Mr. Mahoney.
> A. I think he was all right (R. 86).

The insured's wife testified that she was married to the insured on May 27, 1920, five days after his discharge from service; that she knew him before his enlistment, at which time he was in good health and employed as a bricklayer; and that she had kept in

[5] The testimony of this witness was taken by deposition on behalf of the defendant, and at the trial plaintiff introduced the cross-examination containing the testimony referred to in the text. On direct examination, later introduced by the defendant, the witness testified that when he returned from service the insured was "irritable and very nervous and quarrelsome." "I would say that it was due to the stress that he was in" (R. 320); but that he was personally neat and clean in appearance (R. 321). He testified that he had not formed an opinion as to whether the insured was mentally normal or abnormal (R. 322).

touch with him during his service. She testified that he was irritable, not as strong as he used to be, lighter in weight, and not really well; that he had a back injury that pained him at times (R. 31–33); and that for a period after his return from service he was employed by the Northern States Power Company, earning about $20.00 per week. (R. 34.)[6]

Plaintiff introduced the testimony of three witnesses, Abbott, Dooley, and Hennessy, who had been co-employees of the insured at the power company.

Abbott testified that he entered the employ of the company in February 1921, and was acquainted with the insured thereafter until the latter's resignation (R. 52). He testified that the insured was office boy, doing odd jobs around the office such as filing and making addressograph plates; that he was commonly known among the employes as "Dizzy Mahoney" (R. 53); that frequently he was found in some out of the way place, amusing himself by staring out of the window or playing with some small object, such as an eraser or a pencil; that he was peculiar in that he was

[6] The defendant called the custodian of the payroll records of the Northern States Power Company, who testified from the records that the insured was employed by that company from July 1, 1920 to December 31, 1921, under the title of office boy, and later clerk, for $75.00 per month. He received full pay for each of the months during that period, but the witness testified that no deduction would have been made for loss of time for a day or two because of sickness. He further testified that, while no records were available to show whether the insured lost any time in the year 1920, records for the entire year of 1921 showed that, during that year, the insured was absent on October 28, 29, and 31, and November 26 (R. 296–300).

by himself, didn't associate with fellow employees except to the extent that he did the work assigned to him, "and if you wanted him look for him and give him another job and he would complete that" (R. 54).

Dooley testified that he entered the employ of the company in October 1921 and was acquainted with the insured thereafter until the latter's resignation (R. 61). He testified that the insured performed the duties of office boy and some janitor's work such as cleaning up during the daytime and replacing light bulbs; that the work was distasteful to the insured, possibly regarded by him as being looked down upon and beneath his dignity; and that he came down to the storeroom, where the witness worked, "apparently to get away from that." He further testified that the insured seemed to be physically handicapped, and because he was an ex-service man "I probably sympathized with him"; that definitely he did not associate with other employees; and that he spent time in the basement or hiding in the vault so that the others could not find him (R. 63). He further testified that one Slocum, assistant superintendent, frequently engaged in heated argument with the insured which, on Slocum's part, was mostly kidding, or perhaps picking on the insured because he was easily picked on; that on one such occasion the manager told the insured, who weighed about 135 lbs., that he "had better lay off Slocum," who weighed about 250 lbs., and that the insured replied that "he would cut Slocum down to his size." This witness testified, further, that the insured thought Miss Brogan and Miss Tice,

employees of the power company, had a violent dislike for him and were trying to get his job or make life miserable for him (R. 64–65).

Hennessy testified that the insured worked, to a great extent, under his supervision; that he became acquainted with him through the American Legion and ex-servicemen's activities; that the Legion was then trying to find employment for everyone who had any connection with the War (R. 68–69); that the fact that the insured was an ex-serviceman had considerable to do with putting him to work and keeping him there; that the insured was an "aloner," frequently found staring out the window or into space; that he seemed to take a prejudice against certain people and was difficult to handle; that the insured was not discharged but left voluntarily, with a distinct feeling of relief on the part of the witness; and that, since the company rules are more stringent now than they were in 1920, he would not now hire a man of the insured's capacity as of 1920 (R. 70–72). Hennessy also testified, however:

> He came to work for us as a meter reader, and when he wasn't reading meters he was a general office man doing messenger or office-boy work, working on the addressograph and running errands, and various things of that kind. His work was satisfactory to a certain extent, but he had a peculiar temperament. My recollection is that anything I gave him to do, he would do; he was honest and conscientious. As soon as he had done what he was told to, he was hard to find; he would more or less leave the

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office—not the building—you would have to go and find him.

* * * * *

Q. What would he be doing?

A. Just sitting and apparently thinking, kind of a blank expression on his face; but you would call him and he would be right back on the job again.

Q. Would you state as to the frequency of that hiding out?

A. I couldn't say. Of course, when he was reading meters, he would do a definite job at this. That would be about a week out of the month and then we would use him for a general office boy, and he wasn't around except when you went and found him.

Q. How about in reference to the accuracy of his work?

A. He was a very good meter reader. I don't recall any complaints about the accuracy (R. 69–70).[7]

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[7] Two other co-employees at the power company, Nels Nelson and Blanche Callahan, were called by defendant. Nelson testified that the insured acted just like any ordinary man "Sometimes * * * a bit grouchy"; that as to nervousness and conversation, he appeared to be all right; that "we kind of would kid him a lot, you know, but I naturally do that with a bell hop anyway;" that he did his work satisfactorily and was efficient except for physical defects, but "outside of that, I couldn't say he was different from anybody else." He also testified that it was the custom of the company to start new employees in a position of the type held by the insured and give them a chance to work up to a better job (R. 304–306).

Miss Callahan testified that the insured worked in the same office with her, performing work for which the company always employed a person; that he seemed to perform his work satis-

The plaintiff introduced two medical reports of the insured's condition during the period of his employment at the power company. One was based upon an examination made on April 9, 1921. It discloses that his condition was then diagnosed as "Fracture of Vertebra Simple, 12th Dorsal 1st and 2nd Lumbar. Dislocation of Vertebra (Twelfth)" (R. 136). The prognosis was favorable. The report shows the examining physician's conclusion that the insured's physical and mental condition was such that vocational training was feasible, and "This man's condition is improving and with vocational training should be able to handle any clerical or similar work" (R. 136–137).

The other report was based upon an examination of the insured made on August 18, 1921. The diagnosis and prognosis were the same as that shown by the earlier report, except that the diagnosis contained the additional notation "Needs Dental Work" (R. 139). Again his physical and mental condition was found to be such that vocational training was feasible (R. 140).[8]

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factorily; and that she noticed no signs that he was mentally deficient (R. 307–308). The company records show that, promptly upon the insured's resignation, his position was filled (R. 301).

[8] The defendant introduced the testimony of Dr. McCammel, who made the examinations of April 9, and August 18, 1921. He testified, in effect, that no symptoms of nervous or mental abnormality were manifested at the time of either of these examinations (R. 343, 344, 348), and that on both occasions the insured's health was such that he was able to carry on the occupation of clerk, meter reader, janitor, or any light work "not entirely sedentary," not requiring too much heavy lifting or exertion (R. 343–344).

The insured apparently resigned his position with the power company to enter vocational training. It was testified that he resigned to go west (R. 308), and he in fact entered vocational training at Seattle, Washington, on January 9, 1922 (R. 141). It is shown by plaintiff's evidence that this training continued until May 8, 1924, with an interruption in January 1924 (R. 141), and that he completed a course in accounting (R. 171–172).[9]

The evidence of the insured's condition from 1922 to 1934, offered by the plaintiff, consists primarily of reports of medical examinations made during the interval between those dates and case history given by the insured and his wife, as recorded in reports of examinations made of the insured in 1932 and thereafter. In addition, plaintiff introduced lay testimony as to his appearance on a few short and widely separated occasions between 1922 and 1927.

The medical examination reports showed the following:

January 17, 1923. Diagnosis: Acute Rhinitis—Chronic catarrhal (R. 140).

January 18, 1924. No serious illness. No operations. Has had weakness in back (R. 141). Nervous System: Apparently normal (R. 143). Diagnosis: Fracture of spine. Ankylosis bony of spine. Atony (R. 143).

The insured was found to be unable to resume his prewar occupation on account of his spine, but his

[9] Records pertaining to his vocational training, introduced by defendant, likewise show that the period of vocational training was from January 9, 1922, to May 8, 1924 (R. 395–396).

physical and mental condition was found to be such that vocational training was feasible (R. 140–144).[10]

April 28, 1924. Complaint: "Stiffness and weakness in small of my back if I sit long at a time or walk very far. I am unable to do any lifting or hard work" (R. 147). "* * * complete rigidity of the spine involving the lower dorsals and the lumbar spine" (R. 148). "Nervous System: Negative" (R. 149). Diagnosis:

Fracture of spine.
Ankylosis bony of spine.
Atony muscles of back.
Atrophy muscles of back.
Curvature of spine (Kyphosis).
Curvature of spine (Scoliosis).
Hallux valgus.
Flat feet bilateral 1st degree.
Callosities.
Missing teeth, one.
Dental caries, two.
Gingivitis.
Astigmatism, compound, hyperopic.
Albuminuria (R. 150).

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[10] Dr. Birchfield, one of three doctors who made the examination thus reported, was called by defendant. He testified: "There was no neuropsychiatric examination made. * * * The reason we didn't make one was this, because he gave us a very definite history in his own language, and it was so clear that there was no indication of any nervous or mental condition at that time, therefore he was not referred to a specialist" (R. 353). He also testified that the insured's health was such at that time that he was able to carry on the occupation of clerk, meter reader, janitor, bookkeeper, or any occupation that did not call for heavy manual labor (R. 353).

His physical and mental condition was found to be such that vocational training was feasible (R. 150).

February 11, 1925. No serious ilness since service (R. 151). Has had stiffness and weakness in back, with pains in loins after sitting for any length of time. Marked rigidity of the muscles of the spine with atrophy (R. 152). Nervous system normal (R. 153). Diagnosis: (See last diagnosis above—substantially the same.)

April 16–19, 1926. (Complete report, R. 154–160.) Complaint: "Pains thru back & hips when I sit down and get up—am all stiff." Diagnosis (R. 155). See last diagnosis above—substantially the same.

October 24 to November 1, 1932. Five or six convulsions in past year, causing unconsciousness. Exceptional condition, no other complaints. No treatment of any kind (R. 160). No hospitalization since discharge from service, but during past year four or five spells of some kind. The first one about a year ago (R. 163). "In the Mental Field, except for apprehension, and self-concern, nothing abnormal is elicited. He is quiet, pleasant, and cooperative" (R. 165). Epileptoid seizures strongly suggested by the history, but the findings do not warrant a diagnosis (R. 166). He was regarded by the examiners as competent (R. 168).[11]

[11] Dr. Ernest, one of three doctors making this examination of the insured, was called by the defendant. He testified that the examination included complete neuropsychiatric examination—a study neurologically as well as mentally—and that there was nothing definite for any diagnosis in the neuropsychiatric field (R. 375). He further testified: "His mental condition at that time was perfectly normal except that he was somewhat

Reports of medical examinations made of the insured in 1934 and thereafter, introduced by the plaintiff, contain recitations of the case history as given by the insured and his wife. The history is to the effect that subsequent to completion of his vocational training in May 1924 the insured engaged in occasional odd jobs of bookkeeping, but was not otherwise gainfully employed; that he had been unable to do work requiring any great amount of strength because of his back injury; that he had lived on his compensation, plus his wife's earnings, and had squandered what little money he had in "gambling and dancing"; that seizures started over five years prior to the date of the examination (April 5, 1934),[12] at first occurring only

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apprehensive and was worried and self-concerned. * * * Then the thing that really mentally was bothering him was, he had told me that for the past year he had been having some kind of spells in which he would fall. * * * That was the real reason for his coming in. He was somewhat worried about these spells" (R. 376). He testified further: "His reactions I thought were pretty normal" (R. 380). "I didn't find anything in any examination to indicate that he didn't know exactly what he was doing. I think the evidence we have right here in the report is even better than opinion because he is clear in his understanding of what I wanted him to do and he gave a very good reason why he didn't want a spinal puncture, and certainly he would be able to know whether he had rights as an ordinary citizen would know them" (R. 381).

[12] In earlier statements regarding his attacks, given contemporaneously with the first medical consultation concerning them, it had been reported that the first attack occurred about October 1931 (R. 160, 163, 376; and see reference to medical examination of October 24 to November 1, 1932, *supra*.) The discrepancy in dates may be due merely to a fading of memory with the passage of time, or it may represent a belated belief by the insured's wife that he had mild attacks for a time be-

two or three times a year, but becoming more frequent during the past two years (R. 172). Aside from the seizures, it was reported by his wife, his back had bothered him a great deal, "although he had been fairly well physically," and during the last few years he became more irritable and quarrelsome, and commenced drinking to the point of becoming intoxicated. While intoxicated, he was especially quarrelsome and abusive to his wife (R. 173).

Subtantially the same history, recorded on another occasion in April 1934, contains the additional recitation that:

> There has also been an increasing irritability and antagonism toward his family. He has become somewhat careless in his appearance and habits and while formerly he was more or less sociable, of late years he has been inclined to be seclusive, staying by himself, frequenting pool halls and gambling houses. At one time he thought that his wife was untrue to him and the history shows that his own morals are not above reproach (R. 176).

On another occasion in 1934 it was recorded:

> The wife states that approximately ten or twelve years ago she noticed a decided change in his personality, that he was *beginning* to be irritable and fault finding. She states that he would wake up in the morning in a dazed condition. The wife said that the first seizure occurred approximately five or six years ago, but she thinks

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fore she became aware of them. Both of these possibilities are suggested by the evidence referred to in the two next succeeding paragraphs of the text.

he must have had them before from the way he acted (R. 178).

At the trial, the insured's wife testified that he had his first seizure about 1925, "or around in there. I am not very good at remembering dates," but that they were not frequent until after 1932 (R. 35, 36). She also testified that the insured has seizures now, is older, and not as strong as in 1920, and that otherwise his condition then and at the time of trial was the same (R. 33–34).

Francis Mahoney testified that he saw the insured once or twice about 1927 and that his condition was about the same then as it was in 1920 (R. 90–91). (As earlier pointed out, this witness, interrogated as to whether the insured was sane or insane in 1920, had testified, "I think he was all right" (R. 86).)

James Mahoney testified that he saw the insured occasionally in 1923 and a few times during a two-week visit in 1927, and that he thought his condition was practically the same on each of those occasions as it was in 1920 (R. 322–323). (As earlier pointed out, this witness had declined to characterize the insured as "suspicious of members of the family" in 1920 (R. 94); had likewise declined to agree with counsel that there was an "entire" change in the insured's personality during his military service (R. 95); and had not formed an opinion as to whether the insured's condition was normal or abnormal (R. 322).) [13]

[13] Defendant called three lay witnesses who had been acquainted with the insured during the period from 1922 to 1931.

George Dunlap testified that he was the manager of an apartment house in which the insured and his wife lived from De-

The plaintiff introduced a number of reports of medical examinations of the insured, made in 1934 and thereafter, tending to show that mental deterioration by reason of epilepsy manifested itself as early as March 1934, with psychosis as early as October 10, 1935. Plaintiff also introduced a record of certain state court proceedings reflecting that the insured was found to be incompetent in March 1934.

The medical examination reports show that mental diagnoses of the insured's condition were made as indicated below. Of course, the spinal condition was diagnosed also, and minor conditions, such as absence of teeth, deviation of nasal septum, and flat feet were noted. It seems unnecessary to repeat these physical diagnoses here.

March 10, 1934. Epileptic deterioration (R. 293). (Dr. Evans, who made this diagnosis, was called by plaintiff. His testimony, pertaining, in part, to the distinction between mental deterioration and insanity, is summarized later.)

April 5 to June 10, 1934. (Hospital observation.) Epilepsy, petit mal (R. 130). A report of a single complete examination made during this period (R. 169–

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cember 1922 to May 1924; that he saw the insured frequently and talked with him occasionally; that he was neat and clean in appearance; that he acted just like anyone else, there being nothing peculiar in his conduct; and that, in his opinion, the insured was sane (R. 311–314).

Mrs. Peter Swanson testified that the insured lived in her house from 1924 to 1930; that he drank excessively at times (R. 330), but as a rule he appeared to be normal (R. 332).

Edgar Williams testified that he knew the insured and saw him during the years of 1929 to 1931; and that he observed nothing mentally wrong or abnormal about him (R. 332–333).

179) shows a diagnosis of epilepsy with deterioration from history. The final diagnosis of epilepsy petit mal is explainable, we assume, upon the grounds that during the time he was in the hospital he was considered competent (R. 179, 181, 179); that as the report reflects, he had no seizure from March 9 until May 25, 1934 (R. 177, 183); and that two attacks on May 25 and 26 were light, petit mal in character (R. 182, 183). Also, he was found to be neat in personal appearance, quiet, cooperative, pleasant and congenial, and he showed no evidence of active psychosis (R. 183).

October 10, 1935. (Single examination.) Epilepsy Grand and Petit mal, with psychotic episodes, psychotic at this time (R. 183). (This diagnosis was made by Dr. Ernest who, as earlier pointed out, participated in the examination of the insured in October and November 1932, and who testified that no mental abnormality was manifested in 1932 (R. 380); and that in his opinion the insured then knew exactly what he was doing, just the same as any ordinary citizen (R. 381)).

October 11, 1935–January 17, 1936. (Hospital observation.) Psychosis, epileptic deterioration (R. 130, 147).

February 29 to May 11, 1936. (Hospital observation). Psychosis, epileptic deterioration (R. 131.)

October 29 to November 5, 1937. (Hospital observation.) Psychosis, epileptic deterioration (R. 131, 215.) (Dr. Ernest also made the neuropsychiatric examination at this time (R. 212.) As to the difference between the insured's mental condition in 1932 and 1937,

he testified: "In the first one there was no evidence of any mental change, and in the last one he is definitely psychotic, with deterioration." As to that psychotic condition, he testified: "* * * it isn't difficult for anyone to note it. As a matter of fact, the psychoses are usually diagnosed by the family of the patient and the ordinary physician" (R. 384).)

On each of a number of occasions thereafter, until June 1939, the same mental diagnosis was made by Veterans' Administration doctors (R. 132–133), and Dr. Finley, plaintiff's witness, testified that he found the insured to be of unsound mind upon examination of him on December 9, 1942 (R. 265, 266). (But see Dr. Finley's explanation of what he meant by unsound mind (R. 275), and summary of his testimony, *infra.*)

The plaintiff introduced the record of certain proceedings had in the Circuit Court for the State of Oregon, showing that the insured was adjudged to be incompetent on March 9, 1934 (R. 281–291). That adjudication seems to have been based substantially, if not entirely, upon the findings of a physician who examined him on behalf of the court on the date of the adjudication (R. 285–288).[14]

The plaintiff introduced the testimony of Dr. Evans, who had diagnosed the insured's condition as epileptic deterioration on March 10, 1934 (R. 283). He

[14] Since July 3, 1931, is the latest date upon which the competency or incompetency of the insured has significance in the present case, careful consideration of the evidence relating to 1934 and thereafter is not regarded as necessary, and the Government, therefore, does not deny that the evidence would support a finding that he was incompetent from March 1934.

defined epileptic deterioration as a disease affecting the central nervous system, characterized by the typical convulsion and a change of character to the extent that the patient becomes more or less irritable and hard to get along with, and testified that in severe cases the patients become more or less impaired in mind, becoming "unable to put out the brain work they formerly did" (R. 238). He testified that he would consider the insured as insane, "mentally sick," at the time of his examination of him (R. 238), explaining that deterioration is a mental illness," but it is not psychotic" (R. 247); that deterioration alone, aside from psychiatric disturbance, would not constitute insanity, but that the insured manifested such disturbance on March 10, 1934 (R. 263).

Considering a hypothetical question embracing the plaintiff's version of some of the evidence (R. 240–242),[15] Dr. Evans testified to an opinion that the in-

[15] This question omitted reference to very substantial portions of plaintiff's own evidence, particularly the findings and absence of findings shown in the numerous medical reports of the insured's condition, both during and after his military service, tending to show that the insured had no nervous or mental disability. Since any opinion based upon the question would have been devoid of probative value unless the jury found the facts of the case to be in accord with those in the question, it would seem that counsel for plaintiff hoped that the jury would discredit all of the medical findings introduced by plaintiff. In view of the manner in which Dr. Evans answered the question, no point need be made of it, but in passing, doubt is expressed as to whether the jury might have been permitted to repudiate all the testimony of the plaintiff unfavorable to it, as would be necessary in order to attribute probative value, favorable to the plaintiff, to any answer to the hypothetical question.

sured's condition, as found in 1934, was the end results of his injury in 1918, explaining: "I would put it this way, that had that injury not occurred he would not have had his epilepsy, * * * I don't believe that any man is wise enough to say just when the mental involvement did actually start" (R. 244–245). He further testified that epileptic seizures due to trauma do not usually follow closely upon the injury, but generally occur some two or three years later (R. 253); that in his opinion, based upon the hypothetical question, deterioration has existed from some time prior to 1934 (R. 247), not "right from the start, but the deterioration was the end result of his change of character" (R. 255).

Distinguishing between deterioration and insanity or psychosis,[16] Dr. Evans testified that the information given him in the hypothetical question, plus that obtained upon his examination of the insured in 1934, provided the basis for nothing better than a guess as to when the insured became psychotic, and he repeatedly declined to express any opinion in that respect.[17]

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[16] In framing questions, counsel usually employed the term insanity, while the doctor answered by use of the term psychosis. Presumably the doctor regarded the word psychosis as more definitely descriptive of the condition constituting insanity in the medical sense. Compare the medical statement as to the meaning of insanity (R. 276).

[17] An opinion as to the insured's sanity or insanity was sought as to a number of different dates by resort to several variations of the question. To avoid the duplication, in effect, involved in referring to each instance separately, only typical answers are set forth here.

Thus, as to whether the insured was insane in May 1920, he testified that the hypothetical question would indicate something radically wrong with his mind (R. 244), but "there is a difference between being deteriorated and having a psychosis or being insane * * * On May 22, 1920, he might have had some deterioration and at the same time not be frankly insane or frankly psychotic. It is impossible for me to say" (R. 246). With respect to 1925, he testified: "I contend that he was deteriorated from an early date, but whether he was frankly psychotic in 1925 would be a wild guess on my part. I don't know" (R. 249). With respect to the year 1930, he testified "Again I will have to answer this last question the same as I did the prior one. I don't know", and after the question had been amended he continued:

> I would say that the changing personality, that he was a different man than he was formerly, leads me to conclude that for several years prior to the time that I examined him he was deteriorated and impaired in mind, but I am not wise enough to say when he had these delusions of persecution—when those things started in I don't know, and if you would ask me the question as to whether or not I *though* he was insane in 1933, again I don't know. It is a matter of opinion, and if I answered it I would have to guess. I am basing my answers on my experience in head injury cases. I am contending all along the man was injured mentally, that some damage certainly was done him, or he would not have developed this condition from which he still suffers, but whether he was

> frankly insane or not in those earlier years I just can't say (R. 250–251).

The plaintiff called Dr. Finley, who, upon the basis of a hypothetical question including the findings made by the witness upon examination of the insured on December 9, 1942 (R. 267–268),[18] testified:

> That in January, 1920, this man was at that time mentally ill, that is, the illness that he presented at the time I saw him was in existence at that time.
>
> Q. In your opinion would that individual be of an unsound mind at that time? A. Yes (R. 269).

On cross-examination, he testified that his opinion was based, in substantial part, upon the history of the case, obtained in connection with his examination in December 1942, and reflected by Veteran' Administration records, which he had examined, as well as the hypothetical question (R. 271, 273), and further testified:

> Q. You have given your opinion, Doctor. I am asking for the basis of it. What is there in the hypothetical question or in any information contained in the file or any information given by this man at this trial that indicates to you the condition of this man's mind from 1927 to 1934?

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[18] The considerations stated in footnote No. 15, *supra*, p. 27 are also applicable to this question. Moreover, the question to Dr. Finley required an assumption that the condition in 1920 was the same as that found by the doctor upon examination in 1942 and, in effect, therefore merely asked the doctor's opinion as to the condition which he found.

A. I know of none.

Q. And yet you continue to express your opinion that he was in that period of unsound mind?

A. That is my opinion.

Q. Doctor, what do you mean by "unsound mind"?

A. I mean by "unsound mind" an alteration either in the man's judgment, behavior, memory, or emotional reactions, one part of all of these things.

Q. Is unsound mind synonymous with insanity?

* * * * *

A. The term "insanity" is not a term that is used a great deal in medicine. It is a term that has a very loose meaning and it depends upon your definition of insanity whether it is synonymous with an unsound mind. If you mean by insanity any alteration in the personality, in the way of judgment, emotional reaction, behavior, memory, than it is. If you mean by insanity, as it is often used, that it is a severe type of emotional breakdown or mental deterioration, then it is a severe type of unsound mind (R. 275–276).

ANALYSIS OF THE EVIDENCE

The evidence in this case may be harmonized only with the view that the insured was neither totally permanently disabled prior to August 31, 1920, nor insane prior to July 3, 1931; that at least until 1934 his condition was, as concluded by Dr. Finley, nothing more than an "alteration" either in his "judg-

ment, behavior, memory or emotional reactions" (R. 275). All of the medical evidence, all of the lay testimony and record evidence concerning his pursuit of substantially gainful employment, and the conclusions drawn by lay witnesses from the symptoms to which they testified, tend to show the absence of total permanent disability and insanity as of the critical dates.

There remains only the testimony of lay witnesses to the effect that the insured was, upon specified occasions, nervous, irritable, and nonsociable, and that his conversation was rambling. That testimony was given from memory more than twenty years after the time to which it referred, and must be evaluated in the light of the facts, judicially recognized, that memories fade with the passage of time, and that dates and other details depending upon unaided recollections after the passage of years are uncertain. *Galloway* v. *United States,* 130 F. (2d) 467, 470 (C. C. A. 9), affirmed, — U. S. — (October Term, 1942, May 24, 1943, as yet unreported; *Cunningham* v. *United States,* 67 F. (2d) 714, 715 (C. C. A. 5); *United States* v. *Earwood,* 76 F. (2d) 557, 559 (C. C. A. 5), certiorari denied, 295 U. S. 763; *United States* v. *Brown* 76 F. (2d) 352, 353 (C. C. A. 1).

Moreover, the lay testimony as to the insured's abnormal conduct describes only such symptoms as would ordinarily be regarded as normal incidents of the insured's long period of convalescence from physical injury. It is clear that the symptoms were most noticeable when the insured was home on furlough, months before he was sufficiently improved to be re-

leased from service. They were less noticeable when he was discharged from service in May 1920 at a time when, although his condition had improved, maximum recovery had not been attained. They seem to have been absent almost entirely after January 1922.

The symptoms observed at the time of the furlough were plainly regarded by the witnesses as temporary incidents of his physical illness. He "kind of kept to himself" because he was required to stay in the house most of the time (R. 88–89), "a great deal of the time in the bedroom in bed" (R. 97). Interrogated as to whether, at the time of the furlough, the insured was nervous, changed, and "funny," his brother, Francis Mahoney, volunteered the explanation: "A. Well, when he was home on furlough he was wearing a brace, you see, and he was sick" (R. 88).

The insured's brothers, James and Francis, who had seen him at the time of his furloughs, testified that he was also nervous, irritable, changed, and "funny" at the time of his discharge from service. Since they declined, however, to characterize him at that time as insane (R. 86, 321), entirely changed (R. 95), suspicious of members of his family (R. 94), or unpleasant (R. 84), it is plainly inferable that, to the best of their recollections, his symptoms were less noticeable in May 1920 than they were in the preceding January. James testified, in effect, that the insured had not fully recovered from his back injury at the time he returned from service, and that his nervousness then, as at the time of his furlough in January, was merely a temporary incident of his

convalescence. As to whether he was irritable or nervous in May 1920, he testified, "I would say it was due to the stress that he was in" (R. 320).

The testimony of the insured's wife has special significance in this respect. Apparently she did not see him when he was home on furlough; at least her testimony was confined to the period after his discharge from service in May. She referred principally to his physical injury at the time he returned from service, making only slight reference to nervous symptoms (R. 32–33). It is plainly inferable on the one side that her recollection was free from any confusing impression regarding the more noticeable symptoms manifested at the time of the furlough (attributable to the severe physical disability then existing) and, on the the other, that, in the minds of James and Francis, there was some failure to distinguish, after so many years, between January and May 1920. This is an example of the character referred to by this court in *Galloway* v. *United States, supra,* of the danger of confusing later conditions with earlier ones when resort is had to unaided recollections of occurrences long past.

It is significant, moreover, that the testimony of the insured's wife, who was in a better position than anyone else to know the facts during that period, was not elicited as to the existence or nonexistence, during the decade following his discharge from service, of symptoms of the character noticed by lay witnesses in January 1920. Compare *Galloway* v. *United States, supra,* and consider the testimony of lay witnesses for defendant to the effect that, during that period, the

insured appeared to them to be entirely normal (R. 311–314, 332–333). In giving the history of her husband's condition in 1934 (plaintiff's evidence), the wife stated that he had become more irritable and quarrelsome in recent years (R. 173), and that about ten or twelve years before 1934 he was only "beginning to be irritable and fault finding" (R. 178).

Finally, however—and we submit this alone is decisive against the plaintiff—the witnesses who described the insured's mental and nervous symptoms even during the furlough periods in 1919 and 1920 did not regard them as manifestations of a serious abnormality. One had no opinion as to whether the insured was sane or insane (R. 321), and another thought that he was sane (R. 86). He was not regarded by those closely associated with him as "entirely" changed, suspicious, or unpleasant (R. 84, 94, 95). Whatever inferences might be permitted to be drawn under other circumstances from such general terms as nervousness, irritability, rambling speech, and unsociability, it is plain here that they were intended to describe only eccentricities of conduct, falling short of mental derangement. In its ultimate effect, that is, this lay testimony regarding nervous and mental symptoms was intended by the witness to describe at most only an alteration in judgment, behavior, memory, or emotional reactions.

In addition, evidence showing that the insured was gainfully employed and thereafter followed a course of vocational training, aggregating nearly four consecutive years from July 1920 to May 1924, established conclusively that he was not totally permanently disabled

on or prior to August 31, 1920. Vocational training successfully pursued has been regarded as the equivalent of successful pursuit of a gainful occupation. *United States* v. *Kerr,* 61 F. (2d) 800, 802 (C. C. A. 9); *Nichols* v. *United States.* 68 F. (2d) 597, 598 (C. C. A. 9); *Blair* v. *United States,* 47 F. (2d) 109, 111 (C. C. A. 8).

On the issue of total permanent disability, the present case is governed, we submit, by the decision of this court and of the Supreme Court in *Galloway* v. *United States, supra.* In that case this court held that proof that the veteran had served in the Navy and the Army conclusively refuted any claim of earlier existing total permanent disability, and it characterized as a failure in the plaintiff's case the lack of any evidence of the veteran's condition over a period of ten years from 1922. The Supreme Court rested its decision upon the latter ground, without decision as to the former. In the present case, the insured's work for the power company and his vocational training are, at least, the equivalent of the Army and Navy service in the *Galloway* case. In the present case, there is an absence of evidence favorable to the plaintiff regarding the decade from 1922 equal to that in the *Galloway* case. In the present case, moreover, there is some evidence relating to that period, all of which tends to show the absence of total permanent disability.

The character of the evidence in the present case regarding the period between 1922 and July 3, 1931, is decisive against the plaintiff also on the issue of insanity as of the latter date. Witnesses who did not

regard the insured as insane in 1920 testified that he appeared to be about the same in 1923 and 1927. There is literally no other evidence to show that the insured's conduct or condition was abnormal in any respect between 1922 and July 3, 1931, when the right of suit upon his policy became barred, unless he was then an "insane person." And there is plainly no evidence to show insanity of the character required to avoid the bar of limitations. The term "insane," when used to describe persons excepted from the bar of limitations upon the bringing of suit, means mental derangement bearing a causal relationship to the failure to bring suit. *Clark* v. *Irwin,* 88 N. W. 783, 785–786; 63 Nebr. 639; *Cathcart* v. *Stewart,* 142 S. E. 498, 502; 144 S. C. 252. In the latter case it was stated:

> It is well settled that a man may be insane on one subject, but capable of transacting business on all others. There may be a partial derangement; yet capacity to act on many subjects may exist. The question in any case is not merely whether the party was insane at the time of the questioned transaction, but whether he was so insane as to be incapable of doing the particular act with reason and understanding.

See also: *United States* v. *Kiles,* 70 F. (2d) 880, 883 (C. C. A. 8).

There is no evidence in the present case to show that the insured was mentally disabled prior to July 3, 1931, to act intelligently with respect to his right to sue upon his insurance. Certainly mere alteration of the character attributed to the insured by Dr. Finley does not constitute such disability.

CONCLUSION

It is respectfully submitted that there is no substantial evidence to show that William V. Mahoney was totally permanently disabled on August 31, 1920, or insane on July 3, 1931, and that, accordingly, the judgment should be reversed with instructions to enter judgment for the Government.

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No. 10458

In the United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

PORTLAND TRUST AND SAVINGS BANK, a Corporation, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT,

Appellee.

Upon Appeal from the District Court of the United States for the District of Oregon.

BRIEF FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

JURISDICTION

The appellee concedes and agrees to all that appellant has set forth in its brief under the heading of jurisdiction.

STATEMENT

The action was brought by William V. Mahoney, incompetent, by his guardian, Portland Trust and Savings Bank, a corporation, to recover total permanent disability benefits due him under a contract of war risk term insurance issued during his military service. This policy was issued December 7, 1919; the veteran paid premiums on it to August 1, 1920; by reason of the grace period protection under the policy expired August 31, 1920. The claim for benefits under the policy was filed by the guardian July 28, 1941. This claim was denied November 3, 1941 (R. 9-10) and the action was filed November 19, 1941 (R. 2).

In this case a pretrial was had and a pretrial order was entered December 10, 1942 (R. 9). In the pretrial proceedings appellant denied that the insured became permanently and totally disabled on May 22, 1920 or at any time during the period of insurance protection under said policy and further denied that the insured was insane and mentally incompetent on May 22, 1920, and further denied that the insured had been continuously since said date, insane or incompetent (R. 10-11).

As a result of the pretrial the case was tried upon the issues of whether the insured was insane on or prior to July 3, 1931 and whether the insured became permanently and totally disabled on or prior to August 31, 1920 (R. 11). It was the contention of the Government that if the insured was not insane on or

prior to July 3, 1931 the Court would not have jurisdiction to hear and determine this action (R. 11).

At the request of Government counsel, special interrogatories were submitted to the jury and the jury trial on these issues resulted in affirmative answers by the jury to the two special interrogatories (R. 14-15), and also resulted in a general verdict for the plaintiff (R. 15).

QUESTIONS PRESENTED

1. Whether this appeal should be dismissed by reason of appellant's failure to include in the record on appeal all of the evidence produced at the trial of this action.

2. Whether there was substantial evidence showing that William V. Mahoney was an "insane person" within the meaning of Section 19 of the World War Veterans Act (38 U.S.C. 445), on July 3, 1931.

3. Whether there was substantial evidence showing that William V. Mahoney was totally and permanently disabled on or prior to August 31, 1920.

PERTINENT STATUTES AND REGULATIONS

The appellee concedes and agrees that appellant has properly set forth the pertinent statutes and regulations in its brief.

ARGUMENT

I.

This appeal should be dismissed by reason of appellant's failure to include in the record on appeal all of the evidence produced at the trial of this action.

A judgment was entered in favor of the appellee in this case on December 12, 1942 (R. 17). The Government on December 19, 1942 filed a motion to set aside verdict and judgment, or in the alternative for a new trial (R. 19). This motion was denied on February 1, 1942 (R. 23). The appellant filed its notice of appeal on April 23, 1943 (R. 23) and at the same time filed its statement of points upon which appellant intended to rely on appeal (R. 24), together with its designation of contents of record on appeal (R. 26). Three days later the appellee filed its designation of additional matters to be included in the record on appeal (R. 28). On May 17, 1943, appellant secured an extension of time for filing its record on appeal to and including June 12, 1943 (R. 421). This record on appeal was filed with this Court on June 11, 1943 (R. 423). On June 12, 1943, the appellant filed its designation of the parts of the record to be printed (R. 428). The appellee filed its designation of additional parts to be printed June 11, 1943 (R. 429). June 23, 1943 appellant filed its designation of additional parts of the record to be printed (R. 431). At this point, in accordance with the Rules of Civil Procedure and the rules of this Court, the record was ready to be printed.

On July 7, 1943, the attorneys for appellee received from the appellant a document purporting to be an amendment to the designation of the parts of the record to be printed, although said document was not certified as being a true copy (R. 432-436). On July 7, 1943 Paul P. O'Brien, Clerk of this Court, forwarded to appellee's attorneys a copy of a letter addressed to Francis J. McGan, one of the attorneys for the appellant. Mr. O'Brien's letter referred to the amendment of appellant's designation of the parts of the record to be printed. The intent and effect of this amendment was to cut out and eliminate a considerable part of the record. By this amendment the estimated cost of printing was reduced from $725.00 to $550.00 and thereby twenty-four per cent. of the record made in the trial court was removed from the consideration of this Court.

On July 15, 1943 attorneys for appellee received a letter from the said Francis J. McGan requesting that appellee join in a stipulation agreeing that the record be printed in this case with evidence left out as provided in said amendment. On July 20, 1943 the attorneys for appellee addressed an airmail letter to said Government counsel therein refusing to enter into the proposed stipulation and informing said Government counsel that if the record was printed with the proposed omissions, the appellee would urge a motion for dismissal of the appeal. An open copy of this letter was forwarded to the Honorable Paul P. O'Brien, Clerk of this Court.

It is a well recognized principle of law that where the ground for appeal is, as in this case, the question of whether or not there was substantial evidence to go to the jury, the Appellate Court must have presented to it, all of the evidence that was presented in the trial court, upon which the trial judge passed when it denied a motion for a directed verdict.

Supplement to O'Brien's Manual of Appellate Procedure, 3rd Edition, Page 17:

> "Appellate Court will assume that evidence not in the record justified trial court's findings based on the evidence."

Cole v. Home Owners Loan Corporation, 128 F. (2d) 803, 805 (C.C.A. 9th):

> "The evidence, not having been brought before us, must be presumed sufficient to support this finding. Dombrowski v. Beu, 9th Circuit, 144 F. (2d) 91."

Kentucky Natural Gas Corp. v. Indiana Gas & Chemical Corp., 129 F. (2d) 17, 21 (C.C.A. 7th) held:

> "Defendant insists that the Court erred in adjudging the contract terminated as of December 31, 1940. But again we must assume that the evidence upon which the court based its conclusion in this respect, which is not in the record, justified the finding."

Sublette et al. v. Servel, Inc., 124 F. (2d) 516, 517 (C.C.A. 8th):

> "It is, of course, obvious that the question presented for review cannot be considered or determined by this court upon the defective record furnished by

> the appellant. The findings of the trial court are presumptively correct. In the absence of a proper record, shown to contain all of the evidence essential to enable this court to determine the correctness or incorrectness of the challenged findings, such findings cannot be questioned on review (citing cases)."

In Drybrough v. Ware, 111 F. (2d) 548, 550 (C.C.A. 6th), the court held that it devolves upon the appellant to see that the record is brought to the Appellate Court with such of the proceedings of the trial court as may be necessary for the proper presentation of the points upon which the appellant intends to rely and for lack of such record, the Appellate Court has the power to dismiss the appeal. This power should be exercised when an omission arose from negligence or indifference of appellant. In this case the appellant had filed only a part of the record and there was no showing what evidence, if any, the trial court heard in passing upon the points raised by the appellant.

It should be noted that there is no provision whatsoever, either in the Rules of Civil Procedure or in the rules of this Court which gives an appellant the right or the privilege to file an amended designation of the part of the record to be printed. Rule 19 (6) of this Court provides that the appellant shall, upon the filing of the record in this Court, file with the Clerk a concise statement of the points on which he intends to rely and designate the parts of the record which he thinks necessary for the consideration thereof, there being no provision for amendment of such designation. In this case the original designation of appellant was

filed on June 12, 1943 and twenty-five days later the appellant filed the said amendment. If such a procedure were adopted, it would make it possible to postpone almost indefinitely the hearing of an appeal and thus inflict a hardship on parties who desire to have the appeal heard promptly. In this particular case, it worked an additional hardship in that it prevented the hearing of the arguments at the term of Court held in Portland, Oregon, in September, 1943.

The authorities cited, show that the Appellate Court should have all the evidence heard by the trial court before it when asked to pass on the question of alleged lack of substantial evidence. To see that a considerable part of the evidence was omitted by appellant's action in amending its designation, one has but to read the amended designation (R. 432-434).

In summing up argument upon this first point, it is obvious that this record is defective in that all the evidence is not included. It is further obvious that there is no provision for filing such an amended designation of the parts of the record to be printed. It is clear that appellant acted with knowledge that the appellee would ask this court to dismiss the appeal if the appellant continued to insist on leaving out substantial parts of the evidence and, in face of this, the appellant elected to leave out evidence. Therefore, appellee respectfully moves for an order dismissing the appeal upon these grounds.

II.

There was substantial evidence showing that William V. Mahoney was an "insane person" within the meaning of Section 19 of the World War Veterans Act, (38 U.S.C., 445), on and prior to July 3, 1931.

The appellant in its brief, in the footnote on page three, does not urge, but states that it might reasonably be doubted that insanity on this date would bring the case within the statutory exception. In this same footnote appellant further states that the evidence with respect to July 3, 1930 is substantially the same as that relating to July 3, 1931 and thus accepts the issue as made in the District Court. In two war risk insurance cases, United States v. Todd, 70 F. (2d) 540, and United States v. Anderson, 70 F. (2d) 537, this court stated that appellate courts look with disfavor upon questions raised for the first time in such courts for the reason that the trial court is entitled to have the entire matter presented to it and to be given an opportunity to rule thereon and not be reversed for errors of which it is not aware. In this case, it was clearly determined at the pretrial proceeding (R. 11) that if the veteran was insane on July 3, 1931, the court had jurisdiction to hear and determine this action. This was the understanding by both counsel and by the court. Moreover, Rule 15 (b) of the Rules of Civil Procedure provides that when issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they

had been raised in the pleadings. In this case evidence was produced showing the insanity of the veteran at the time of his discharge from the army. Furthermore, there was in addition to the special interrogatories, a general verdict by the jury, the first part of which found generally in favor of the plaintiff and against the defendant. So even if this court were to find that it was necessary to prove that the insured was insane on or prior to July 3, 1930, there was a finding generally by the jury in favor of the plaintiff and the special interrogatory requested by Government counsel referring to the date July 3, 1931 would have been immaterial as the evidence showed the veteran was insane on and prior to July 3, 1930.

It is, of course, pertinent to look at the evidence showing that the veteran was an insane person not only on July 3, 1930, but continuously insane since August 31, 1920.

Clara Mahoney, wife of the veteran, testified she knew her husband prior to his entry into the service at which time there was nothing wrong with him (R. 31). They were married five days after his discharge while the veteran was still in uniform (R. 31). This suggests that she had no opportunity to really know his condition at that time. Further, the wife testified that her husband was in the same condition at the time of trial as he was when she married him in May, 1920 (R. 34), outside of having seizures. The first seizures she noticed were around 1925 (R. 35).

Appellant's brief (Page 34) comments on the wife's being in a better position than anyone else to know the facts about her husband's condition following his discharge. This is true, but this witness had lived with an insane man from 1920 to the time of trial, except for the times he was confined in hospitals for the insane. She had been through harrowing experiences (R. 173, 178, 194, 286, 372 and 373). The court and the jury had an opportunity to observe this witness and clearly understood the handicaps under which she was testifying and furthermore, believed her testimony.

Government counsel, in his opening statement (R. 399), admitted the insured was permanently and totally disabled around 1934. In Government counsel's closing argument (R. 401) he stated, "He is no doubt permanently and totally disabled now. He no doubt has been for several years, perhaps since 1936."

Therefore, based upon the above admissions and the testimony of the wife that the veteran was the same at the time of trial as he was in 1920 while the policy was in force, is substantial evidence in itself. The jury could have reasonably found on this evidence alone, coupled with the above admissions, that the veteran was insane and permanently and totally disabled prior to the lapse of his policy.

Mrs. Frank Donahue, sister of the veteran, testified that the veteran's health and mental condition prior to his entry into service was very good (R. 38-39). She observed the veteran while home on a fur-

lough after his injury in France and before his discharge from the army, and noticed the following:

> "He was very nervous and quarrelsome and seemed to be afraid of something,— I just don't know what it was—and his mind seemed to be rambling. He would carry on a conversation, he would ramble and never could stay on one thing at a time, subject." (R. 39)

This witness further stated that during this furlough her brother was very nervous, hard to get along with, thought everyone was down on him, conversation wandered, be on one subject and then would discuss something else (R. 42-43). All of these symptoms of mind wandering, being suspicious of other people, etc., were not present before he went into the army (R. 44). In other words, we have here an individual, due to his suffering and stress of army life, who came out with a changed personality.

This witness also testified that at the time of her visit in Portland a few days before trial, she didn't see any change in his condition at this time compared to his condition at the time of the furlough in January, 1920 (R. 42).

This witness, as pointed out in appellant's brief (footnote, Page 10) was confused as to dates. However, her testimony definitely referred to the time of the furlough. When checking the Government records we find the veteran had two furloughs, first a thirty day leave in October, 1919, and again from January

25, 1920 to February 10, 1920 (R. 117). Therefor it appears that she made her observations on either one or the other of these two furloughs.

A. E. Abbott testified that he is the Bookkeeper for Northern States Power Co. in Minneapolis, Minnesota; that he met Mahoney in February, 1921 at the company's plant in Minot, North Dakota (R. 52); that veteran bore the nickname "Dizzy Mahoney"; that while Mahoney was supposed to be working you would usually find him in some out of the way place amusing himself by either looking out the window or playing with some small objects in his hands (R. 54). Further testified, "He was peculiar." (R. 54); that he did not associate with others, he kept to himself (R. 54).

Walter Dooley, statistician for the same company, testified that the veteran while employed by his company didn't do much associating (R. 62-63). On one occasion the manager told Mahoney to lay off of a Mr. Slocum who weighed 250 lbs., Mahoney weighing 130 or 135 lbs., and Mahoney replied he would cut Slocum down to his size (R. 64).

Mahoney thought certain employees disliked him very much and thought they were out to get his job, get rid of him or make life miserable for him (R. 64-65).

J. A. Hennessy, Auditor of stores and garages for this company, testified that he was Chief Clerk at Minot and to a great extent directed Mahoney's work and had charge of his activities. R. 68). This witness

was a World War veteran and active in the American Legion. He testified that the Minot American Legion Post was trying to place those who had been in the service and that was the reason Mahoney was employed (R. 68-69).

He testified that the veteran, as soon as he had done what he was told to do, was hard to find; he would more or less leave the office—not the building. You would have to go and find him and he would be in the basement or on the second floor just sitting and apparently thinking, kind of a blank expression on his face (R. 69). Didn't put him on work requiring accuracy (R. 70). He was pretty much of an "aloner" (R. 70). Observed veteran when he went to find him and would find veteran staring out the window or into space (R. 70). Veteran was difficult to handle. He seemed to take prejudice against certain people (R. 70).

This witness further stated he was a service man himself and then testified (R. 70-71):

> "Q. Would you tell the court and jury if this had anything to do with employing Mr. Mahoney?
>
> A. I think it had a lot to do with my putting him to work and keeping him working. In those days we were very swmpathetic towards each other and tried to help each other and I would say it had considerable to do with both.
>
> Q. Mr. Hennessy, in the absence of sympathy or feeling about being a World War Veteran,

would you now hire a man of the capacity Mr. Mahoney had at the time Mr. Mahoney worked for the company?

A. I would not personally and, of course, our company rules are more stringent than they were in those days, even though my sympathy were with him."

On cross-examination testified that the veteran left his employ with a distinct feeling of relief on the part of this witness (R. 71).

These three witnesses were fellow employees of the veteran. One of them was the man who employed him and who supervised his work. This is the only period of employment of this veteran since discharge from service. He proved to be unsatisfactory because of his mental condition. He was peculiar and was possessed of an unsound mind.

John Mahoney, brother of the veteran, testified that the veteran was normal physically and mentally and was working before he entered the army (R. 74). During the furlough this witness noticed that his brother had changed considerably referring to his mental condition (R. 77). The veteran would sit in the house with a stare on his face. You would have to talk to him several times to get an answer out of him. Didn't associate much with other people (R. 77). Imagined everybody was bothering him—somebody after him. His conversation was very rambling, be talking on one subject and switch over to something else, couldn't make head or tails of it. He would sit

and stare, dream and didn't seem to want to talk to anyone (R. 78). He was very irritable. None of these things were present before he went into the army (R. 79).

Francis Mahoney, brother of the veteran, testified by deposition at the request of the Government and stated that when the veteran got home from the service he was awfully nervous; he was not the same as when he left, his actions, he acted funny, irritable and nervous (R. 84). His conversation was rambling. He would start to say something and say something else (R. 85).

On cross-examination this witness testified that when Mahoney was home on the furlough he was nervous and was kind of funny in that he was suspicious of members of the family and other people (R. 89-90). He talked funny at times. His conversation was different than it was before he went into the army. Noticed an entire change of personality when his brother returned from the army as to what it was before he went into the army (R. 90).

Francis Mahoney next saw his brother in Portland, Oregon, around 1927 and noticed the same condition that he noticed before (R. 91). He visited his brother at the Veterans Hospital at Roseburg, Oregon on two occasions (R. 91). The veteran's first admission to the Veterans Hospital, Roseburg, Oregon, was on January 19, 1938 (R. 216). Findings of the Government doctors were: psychosis, epileptic, deterioration, as well as physical disabilities, and under "re-

marks" stated Mahoney was considered by the staff to be mentally incompetent and his disability to be permanent and total (R. 223). Francis Mahoney testified that his brother was about the same when he saw him at the Roseburg Hospital where the Government doctors found Mahoney insane as the veteran was at the time of his discharge (R. 92). It was this witness's opinion that his brother was queer when he came home and his actions were different but did not hold himself out as an expert in determining whether a man is insane or sane (R. 92).

James Mahoney, another brother of the veteran, testified by deposition at the request of the Government, that when the veteran came home from the army he was irritable and felt he was getting the worst of things, never took any interest in any one particular thing, didn't associate with friends, felt people were against him, when talking would skip from one subject to another, there was a change in his personality (R. 94-95), none of these things were true before he went into the army. Prior to his service he was normal mentally (R. 95). This witness noticed the same changed condition in his brother when he saw him in Portland in 1923 (R. 95). Also in 1927 (R. 96) noticed that his brother's conversation was rambling.

> "I mean that he would not talk on one subject. He would ask a question. Perhaps before you would answer the question, he would ask you another one on something else" (R. 321).

Testified further that his brother always seemed to be practically the same (R. 322).

This witness next saw his brother in 1923 and stated his condition was practically the same as it was in 1920 (R. 323). Again saw him in 1927 and the condition was again still the same (R. 323).

Dr. John Evans, Superintendent of the Oregon State Hospital for the Insane, testified he first examined the veteran on March 10, 1934, found him suffering from epilepsy with deterioration (R. 236) and was insane, mentally sick at that time (R. 238). A hypothetical question based on evidence produced at the trial was asked this witness (R. 240-242) and the doctor stated that at the time of Mahoney's discharge from the army in 1920 it was his opinion that there certainly was something radically wrong with Mahoney's mind; that there would have to have been something wrong (R. 244). That in his opinion Mahoney's entire trouble was the result of the head injury or injury to the central nervous system he received on November 11, 1918 (R. 244). If this injury had not occurred he would not have had epilepsy (R. 244). His impaired state of mind must have started perhaps within a few months following the head injury. Couldn't say whether it was the first two weeks or the first two months or a year but believe it was during that period (R. 245). This would bring his impaired state of mind long before his policy lapsed in August 1920. In his opinion the mental symptoms started prior to 1920 (R. 246). That the veteran was deteriorated

for some considerable period prior to this doctor's examination (March 10, 1934), that the veteran's brain was injured which is much more harmful and much more permanent than some of the functional conditions known as being psychotic or insane (R. 247). This is a type of mental illness (R. 247). The best way to tell when this man became insane would be from the persons who associated with him and saw these changes of personality (R. 248). Further testified that the veteran's condition was permanent (R. 251). On cross-examination testified that the symptoms given in the hypothetical question were sufficient on which to base a diagnosis of mental deterioration (R. 256).

Dr. Knox Finley testified he examined the veteran shortly prior to trial and found him a very dull individual (R. 265) and performed an electroencephalogram that showed the veteran's brain was not functioning normally (R. 266) and in his opinion Mahoney was of unsound mind at the present time (R. 266). That there is no cure for this condition (R. 266); that his judgment would be impaired, be a lack of acute thinking, also memory was partially impaired, judgment defective (R. 266). Upon being asked a hypothetical question based on the evidence, this expert said that in his opinion the veteran in January, 1920 when he came home on a furlough was mentally ill; that the illness the doctor found on examining the man shortly before the trial was in existence at that time and Mahoney was of unsound mind in January, 1920

(R. 269). By unsound mind this witness meant an alteration either in a man's judgment, behavior, memory, or emotional reactions, one part or all of these things (R. 275). That the term insanity is not used in medicine. If you mean by insanity, alteration in the personality in the way of judgment, emotional reaction, behavior, memory, then it is synonymous with unsound mind (R. 276). In this witness's opinion veteran was psychotic in 1929 or 1930 (R. 277).

Dr. F. J. Ernest, a Veterans Bureau doctor, testified for the Government that when he examined the veteran on October 24, 1932, he found no evidence of any abnormality (R. 380). He again examined the veteran on November 4, 1937 and diagnosed the veteran as suffering from psychosis, with epileptic deterioration (R. 383). This witness also examined the veteran on October 10, 1935 and made this diagnosis: epilepsy grand and petit mal with psychotic episodes. Psychotic at this time (R. 184).

It is interesting to compare the neurologic examination (R. 164) made by Dr. Ernest on October 24, 1932, when he was unable to find any abnormality, with the neurological examination made at American Lake on October 11, 1935 (R. 187), when the doctors found the veteran to be incompetent, socially and economically inadaptable and requiring hospitalization (R. 195) with a diagnosis of psychosis, epileptic deterioration (R. 195), there not being any differences in the neurological findings at all. Unfortunately this witness, though experienced in his field, failed to realize the

patient's condition when he first saw him and it wasn't until he saw the patient the second time he realized he was psychotic. This is not meant as a criticism of the doctor's ability, but this very thing often happens. If the doctor had known this patient before the war and then observed the marked change of personality, he probably would not have made this mistake.

On cross-examination this witness admitted he based his diagnosis of mental incompetency the second time he saw the patient, in that Mahoney's conversation was rambling (R. 387-388). It should be noted the evidence showed Mahoney was in this condition ever since his furlough in 1920. This witness in answer to a hypothetical question (R. 389-390) admitted that Mahoney's symptoms were evidences of abnormality and if present continuously it would be evidence of mental deterioration, of change (R. 390). Evidence of an unsound mind (R. 391). Also admitted that it was usually the members of the family that noticed these changes and then the individual is finally brought to the psychiatrist because of his abnormality (R. 391).

In addition to the oral testimony there was documentary evidence.

Exhibit 12 showed veteran's condition at discharge to be poor (R. 100).

Exhibit 4 showed veteran became unfit for duty from present disease or injury November 11, 1918. Also showed an eighty per cent disability at time of discharge from army service (R. 102-103). Veteran

injured by being hit on the head by three sacks of potatoes at Langres, France on November 11, 1918 (R. 111). Disability 80% (R. 112).

Exhibit 4 also included the clinical record pertaining to the treatment of this veteran (R. 114-129) which stated:

History of present disease, November 11, 1918, three sacks of potatoes fell and hit him on head and shoulders and jack-knifed him (R. 114). Lamenctomy at Langres, France, November 11, 1918 (R. 115). October 25, an absolutely helpless patient when down. Can't rise, nor dress, nor wrap leggings (R. 116). October 27th, walks like ghost or slips about like a mummy on skids (R. 117). March 28, 1920—Patient is extremely nervous and borders on hysteria (R. 119). This same record shows that the veteran was continuously hospitalized from November 11, 1918 until his discharge with an eighty per cent disability on May 22, 1920 (R. 98-129).

Exhibit 1. The first examination by Government doctors following discharge on April 9, 1921, under No. 10 was the finding "Unable to work." (R. 135). The next examination was on May 5, 1921, but record states did not examine the man, merely took data from the file (R. 137).

Exhibit No. 1. The first Neuro-psychiatric examination of this man was made on October 24, 1932, as part of an examination for compensation purposes (R. 160) (R. 163-166). This N. P. examination was by Dr. Ernest who testified at the trial. The record of the

examination is concluded with the statement: "Diagnosis:—Undiagnosed. (Alleged seizures.)" (R. 166). This does not seem to square with this witness's testimony he could find nothing wrong. If nothing had been wrong his diagnosis would have so stated.

Next N. P. examination was on May 10, 1934 (R. 169-179) and given diagnosis of epilepsy with deterioration (R. 179). Under summary the staff of doctors at American Lake Hospital stated: "It is quite evident from the history of this case that his difficulties started, possibly, during the war, when he received a severe injury to his back.—The wife states that approximately ten or twelve years ago she noticed a decided change in his personality" (R. 178).

Examination of October 10, 1935 by Dr. Ernest, in which he found the veteran psychotic and suffering from epilepsy (R. 184). At this time the doctor who testified for the Government was able to diagnose the case. In the N. P. examination at American Lake, October 29, 1935, the Government doctors found: psychosis, epileptic deterioration and it was their opinion that the patient was incompetent (R. 195). In this same examination, the Government doctors commented that Mahoney had vocational training in 1922 but was never able to take the proper advantage of this training and further that veteran did not make a very good economic adjustment at any time (R. 193).

Examination at the same insane hospital of the Government on April 15, 1936, showed the same psychotic condition. Also the statement that there is a

history of moderate amount of alcoholism which apparently bears no relation to seizures (R. 202). This is pointed out merely because the Government attempted to inject alcoholism into this trial as being the cause of the veteran's disability and here the Government's own doctors when not in court, definitely state this is not true.

The remaining government examinations are essentially the same except it might be pointed at the first examination at the Government's hospital for mental cases in Roseburg, Oregon, on February 18, 1938 (R. 224) the doctors stated that the veteran was mentally incompetent and his disability permanent and total (R. 223). It should be remembered some of the lay witnesses saw the veteran at this hospital and stated his condition was the same then as it was at the time of his discharge.

This veteran was committed by a Court of the State of Oregon upon a finding that he was insane on March 9, 1934 (R. 289-291).

What is the meaning of the word "insane" as used in the statute (38 U.S.C. 445). The following authorities have passed on this point:

Webster's International Dictionary, Second Edition, Unabridged

Defines "insane" as:

> "Unsound, exhibiting unsoundness or disorder of mind."

Defines "insanity" as:

"Unsoundness or derangement of mind. Insanity is rather a social and legal than a medical term, and implies mental disorder resulting in ability to manage one's affairs and perform one's social duties. The nature and degree of insanity required to affect a person's civil capacity varies with the nature of the case, the general test being as to whether with respect to the matter in hand, the person can act rationally, understanding the nature of his act and natural consequences of it in affecting his rights, obligations and liabilities."

Black's Law Dictionary, Third Edition
Page 972:

"Insane. Unsound in mind; of unsound mind; deranged, disordered, or diseased in mind. Violently deranged; mad."

"Insanity. Unsoundness of mind; madness; mental alienation or derangement; a morbid psychic condition resulting from disorder of the brain, whether arising from malformation or defective organization or morbid processes affecting the brain primarily or diseased states of the general system implicating it secondarily, which involves the intellect, the emotions, the will, and the moral sense, or some of these faculties, and which is characterized especially by their nondevelopment, derangement, or perversion, and

is manifested, in most forms, by delusions, incapacity to reason or to judge, or by uncontrollable impulses. In law, such a want of reason, memory, and intelligence as prevents a man from comprehending the nature and consequences of his acts or from distinguishing between right and wrong conduct."

"* * * 'Insanity in law covers nothing more than the relation of the person and the particular act which is the subject of judicial investigation. The legal problem must resolve itself into the inquiry, whether there was mental capacity and moral freedom to do or abstain from doing the particular act.' 1 Whitth. & Beck. Med. Jur. 181; U. S. v. Faulkner, 35 F. 730."

"* * * By insanity is not meant (in law) a total deprivation of reason, but only an inability, from defect of perception, memory, and judgment, to do the act in question, (with an intelligent apprehension of its nature and consequences) * * *."

Page 1786:

"Unsound mind. A person of unsound mind is one who from infirmity of mind is incapable of managing himself or his affairs."

Page 981:

"To constitute insanity such as will authorize the appointment of a guardian for the patient, there must be such a deprivation of reason and judg-

ment as to render him incapable of understanding and acting with discretion in the ordinary affairs of life; a want of sufficient mental capacity to transact ordinary business and to take care of and manage his property and affairs. See Snyder v. Snyder, 124 Ill. 60; 31 N.E. 303; In re: Wetmore Guardianship, 6 Wash. 271; 33 P. 615."

"Insanity as a plea or proceeding to avoid the effect of the Statute of Limitations means practically the same thing as in relation to the appointment of a guardian. On the one hand, it does not require a total deprivation of reason or absence of understanding. On the other hand, it does not include mere weakness of mind short of imbecility. It means such a degree of derangement as renders the subject incapable of understanding the nature of the particular affair and his rights and remedies in regard to it and incapable of taking discreet and intelligent action. See Burnham v. Mitchell, 34 Wis. 134."

Law Dictionary With Pronunciations by Ballentine Defines "insane" as follows:

"Unsound in mind or intellect; mad; deranged in mind; delirious; distracted."

Defines "insanity" as follows:

"A diseased or disordered condition or malformation of the physical organs through which the mind receives impressions or manifests its

operations, by which the will and judgment are impaired and the conduct rendered irrational. 14 R.C.L. 550."

Dorland, The American Illustrated Medical Dictionary, 15th Edition

Defines "insane" as follows:

"Affected with insanity; not of sound mind."

Schouler on Wills, 1889—Section 100

"Insanity, to define that word, settles, as we have already indicated, in the opinion of the best medical men, into a comparison of the individual with himself and not with others; that is to say, some marked departure from his natural and normal state of feeling and thought, his habits and tastes, which is either inexplicable or best explained by reference to some shock, moral or physical or to a process of slow decay, which shows that his mind is becoming diseased and disordered."

Connecticut Mutual Life Insurance Co. v. Lathrop, 111 U.S. 612, 619:

"Whether an individual is insane, is not always best solved by abstruse metaphysical speculations, expressed in the technical language of medical science. The common sense, and, we may add, the natural instincts of mankind, reject the supposition that only experts can approximate certainty upon such a subject. There are matters of which all men have more or less knowl-

edge, according to their mental capacity and habits of observation * * *."

Oklahoma Natural Gas Corp. v. Lay
175 Okl. 75; 51 P. (2d) 580, 582 (1935)

"The word 'insane' ordinarily implies every degree of unsoundness of the mind or of mental derangement, from temporary nervous excitement to acute insanity, and therefore includes the extreme case of an entire want of understanding. 32 C.J. 613, Paragraph 82."

"Unsoundness of mind has been judicially declared to be synonymous with insanity. It exists where there is an essential privation of the reasoning faculties, or where a person is incapable of understanding and acting with discretion in the ordinary affairs of life. 32 C. J. 621, paragraph 71."

Buchanan v. Wilson
97 Neb. 369; 149 N.W. 802, 806 (1914)

"Insanity is a mental symptom or manifestation of physical disease which impairs the understanding so that one or more faculties of the mind is perverted, weakened, or destroyed."

Cundell v. Haswell
23 R.I. 508; 51 A. 426, 428 (1902)

"The primary definition of insanity, according to the Century Dictionary, is 'unsoundness of mind'. And that a person who is incapable of

continuous or connected thought is unsound in mind would seem to be so self-evident and so manifestly true as to render argument thereon superfluous."

Fendler v. Ray
331 Mo. 1083; 58 S.W. (2d) 459, 464 (1932)

"Unsoundness of mind has been judicially declared to be synonymous with insanity."

Knapp v. St. Louis Trust Co.
199 Mo. 640; 98 S.W. 70, 78 (1906)

"A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated by proof of acts, declarations and conduct inconsistent with the character and previous habits of the person."

Beattie v. Bower
290 Mich. 517; 287 N.W. 900, 903 (1939)

"Insanity is a broad, comprehensive and generic term of ambiguous import, for all unsound and deranged conditions of the mind. It includes every species of organic mental derangement, whatever may be its source or cause, whether the mental condition is congenital, or the result of arrested mental development, or of the act of Providence, or of the party's own imprudence, or of religious excitement, or of physical disease, or of dissipation, or of old age, or of unknown causes, or whether it is personal or hereditary."

In Application of Jordan
10 N.Y.S. (2d) 911 (1939)

> The court held that the word "insane" or "insanity" ordinarily implies every degree of unsoundness of mind and that degrees of insanity are recognized in jurisprudence.

In State v. Lyons
113 La. 959; 37 So. 890 (1904)

> The Supreme Court of Louisiana held that insanity is a disease or abnormal condition which manifests itself in eccentricities of conduct, speech, or appearance; that is to say, in the doing and saying of things which attract attention because, judged by the common standard, they are deviations from that which is regular and usual.

The trial judge very carefully and thoroughly defined the meaning of the word "insane". The court's definition and interpretation of the words "insane" and "insanity" followed the above quoted authorities (R. 406-408). There was an abundance of evidence in this record showing that the veteran was possessed of an unsound mind at the time of his discharge from the army. Further, there was an abundance of evidence showing that the veteran had mental symptoms and a mental disease which impaired his understanding. The veteran's mental condition was such as to induce a deviation from his normal conduct compared to the way he acted before he was afflicted with this mental

disease. As stated in Black's Law Dictionary, supra, insanity is a manifestation of disease of the brain. All of the evidence in the present case shows that this veteran had a disease of the brain shortly following his injury in France. This veteran from the time of his discharge did not possess sufficient judgment to render him capable of understanding and acting with discretion in the ordinary affairs of life. This veteran certainly, due to his disordered mind, did not know of the necessity of filing such an action as the present case in order to recover the benefits due him on his policy of war risk insurance. It was not until a guardian was appointed that it was possible to protect the rights of this incompetent veteran. The primary definition of "insanity" is unsoundness of mind, and unsoundness of mind has been interpreted by the courts to be synonymous with insanity. Dr. Finley testified that in his opinion, based upon his examination of the veteran shortly prior to trial, together with the symptoms noticed by the veteran's family and friends at the time of the furlough in January of 1920, and the symptoms that continued right on up to the present time, that Mahoney was of unsound mind in January of 1920. In other words, he was insane in January of 1920, under the legal definition of insanity, as Dr. Evans said there was something radically wrong with Mahoney's mind at the time of his discharge from the army (R. 244-245).

A marked change in a person's habits and thoughts is evidence of mental unsoundness. Insanity is indicated and proved by a showing of acts, declarations

and conduct inconsistent with the character and previous habits of the person. In the present case there was a great quantity of evidence showing the type of individual the veteran was prior to his service and the marked change in personality when the Veteran returned home on his furlough in January, 1920. This marked change continued on down to the present time. For example, the rambling speech, the disconnected thoughts, being suspicious of his family and fellow employees, highly nervous, being afraid of something; being known as "Dizzy Mahoney", staring out into space, fumbling with small objects in his hands while supposedly working, being noted as being peculiar, blank expression on his face, being by himself—not wishing to associate with others and acting funny. This was an entirely different man from the Mahoney who enlisted in the United States Army in 1917. Prior to his service he was a typical young Irish man of a small community, sociable in nature, liking to go to dances and mixing with his fellow men, steadily employed and making his own way in the world. While in the army he suffered a severe blow to his head and back and was continuously hospitalized from November 11, 1918 until his discharge in May of 1920. Here we have the cause of this man's mental breakdown while in service. This is what the Government doctors say was probably the start of his mental condition; here is what Dr. Evans, Superintendent of the Oregon Hospital for the insane, states is the cause of his mental condition. When he returned home the family noted the changed man. There was not only substantial

evidence but a vast preponderance of evidence showing that Mahoney prior to the lapse of his policy had become insane within the meaning of the term.

The appellant refers in its brief to the case of Galloway v. United States, 130 F. (2d) 467 (C.C.A. 9) Affirmed. . . . U. S. . . ., 63 S. Ct. 1077. In this case the trial court directed a verdict for the defendant and this court affirmed the trial court. The evidence in the Galloway case is considerably weaker than the present case. In the first place, the lay witnesses were very indefinite. For instance, the witness O'Neill stated that he could not recall whether he saw the veteran once or a thousand times and the other testimony was of a like character. Furthermore, it was developed by the Government in its evidence that the veteran was in the service during subsequent enlistments during the period of time that the lay witnesses were presumed to have seen and observed the veteran's condition. Nevertheless, the Supreme Court of the United States, in the opinion of Justice Rutledge, held that the chaplain's testimony gave strong evidence that the man he observed was insane. However, there was a fatal weakness in the chaplain's evidence when the chaplain admitted that he might have been mistaken as to the time of his observance of the veteran. In other words, if the chaplain's testimony had been clearly identified, the Supreme Court of the United States would have held it to have been an error to have directed a verdict for the Government. Of course, this case had other weaknesses in that the veteran had two

enlistments subsequent to the lapse of his policy and as this court stated, these two enlistments were such physical facts as to refute any reasonable inference that might be drawn from the evidence that the veteran was totally and permanently disabled during the life of his policy.

In view of the Supreme Court's holding that if the chaplain's testimony had been clearly identified it would have been strong evidence that the veteran was insane, it is interesting to look at the testimony of the chaplain. This testimony appears on pages 72-78 in the record of the Galloway case on file in this Court. All the chaplain's testimony really amounted to was that he noticed that the veteran was mentally deranged because of the fact that he would usually find him abnormally depressed and the veteran would excitedly launch into a discussion of what to his understanding was discrimination on the part of the military authorities. Further, the veteran seemed to have no interest and showed no interest in army life in general and manifested no interest in anything outside of his own claim; that it was extremely difficult to divert the soldier from his claim, in that he could not apparently concentrate on any other subject which the chaplain would introduce for discussion. The chaplain stated that he noticed a mental breakdown because of the abnormality and uncalled for excitement and the feeling that the veteran had of being mistreated. That the veteran appeared to be in a state of depression and his general appearance was that of

mental exhaustion and this witness considered the veteran to be irrational.

Now the above was the sum and extent of the chaplain's testimony which the Supreme Court of the United States held was strong evidence of the veteran being insane. In our present case we have many more symptoms and much stronger symptoms of insanity right from the time the veteran first came home on his furlough in 1920.

The facts in the present case are much stronger than the facts were in the case of Halliday v. United States (315 U.S. 94). In that case the trial court denied the Government's motion for a directed verdict and the jury returned a verdict for the veteran. The Appellate Court reversed the trial court and the Supreme Court of the United States reversed the decision of the Circuit Court of Appeals. The Supreme Court commented on the fact that one brother testified that the veteran's condition upon his return was practically the same as it is today.

Under such a record it was clearly a question for jury to pass upon as to whether or not the veteran was insane on or prior to the critical date.

In Berry v. United States (312 U.S. 450) the facts of the case were that the veteran received an injury while in France. The Government gave the veteran vocational training and the veteran worked for a substantial period of time following his vocational training and the court held that taking the evidence as a whole, the jurors who heard the witnesses and

personally examined the petitioner's wounds could fairly have reached the conclusions that since his injuries the veteran never had been able, and would not be able thereafter, to work with any reasonable degree of regularity at any substantially gainful employment. The Supreme Court also ruled that the trial judge, who had the same opportunity as the jury to hear the witnesses, denied the Government's motion for a directed verdict and correctly instructed the jury what they must find from the evidence in order to return a verdict for petitioner. In other words, the later decisions of the Supreme Court of the United States, as well as those of the Circuit Court of Appeals, are to the effect that war risk insurance cases are usually factual matters and ordinarily should be submitted to a jury to determine the factual matters.

In conclusion, we submit that there was an abundance of substantial evidence showing that this veteran was not only insane on July 3, 1930 but had been insane since at least August 31, 1920 and while his policy was in force and effect. The interpretation of the word "insane" as used in the statute is amply explained in the above quoted authorities. Certainly within the meaning expressed in these authorities, this veteran was insane. Further, the jury was carefully and thoroughly instructed on the meaning of the word "insane" and at the Government's request were given a special interrogatory on this question. The able attorneys representing the Government took no exception to any of these instructions.

The trial court clearly did not err when it overruled the Government's motion to dismiss this case for lack of jurisdiction.

III.

There was subtsantial evidence showing that William V. Mahoney was totally and permanently disabled on or prior to August 31, 1920.

Much of the substantial evidence which sustains appellee's contention is reviewed in our argument under Point II. We reiterate the same by reference here rather than to repeat this testimony. This in itself constitutes a conclusive answer to appellant's contention on this point.

As the veteran was insane since January, 1920 and the doctors all admitted this type of mental disease due to trauma, a head injury, is incurable, the veteran's insanity was permanent. The subsequent facts, even without the doctor's testimony proves this. He had the disability at discharge, still has it and the Government admits the veteran is totally and permanently disabled now.

But in addition to having a veteran that was mentally disabled while his war risk policy was in force, in this case, we have a veteran who received a severe physical disability on November 11, 1918 for which he was continuously hospitalized up to the time of his discharge on May 22, 1920 for over eighteen months.

At times during this eighteen months the army doctors found the veteran to be an absolute helpless patient when down (R. 116); walks like ghost or slips about like a mummy on skids (R. 117); is extremely nervous and borders on hysteria (R. 119). The veteran was given a certificate of disability for discharge (R. 102) and was found to be eighty per cent disabled (R. 103).

Counsel for the Government, in his opening statement, said: (R. 399)

> "The Government admits without any hesitation that Mr. Mahoney has a permanent disability and has had a permanent disability of severity since the day of this discharge from the army * *."

The Government offered evidence of one period of work performed by Mahoney following his discharge from the army. This evidence was by the witness McGrath (R. 295). It was taken by deposition and counsel for the plaintiff was not present to cross-examine this witness. McGrath did not know the veteran and only read into the record what the Northern States Power Co. records showed, that is, employment from July, 1920 to December, 1921 (R. 296-302). The veteran was given this job of office boy, although a grown man, because of the activity of the American Legion and the sympathy of J. A. Hennessy (R. 71). The jury could have well drawn the inference from Hennessy's testimony that the veteran was away from his work and a definite notation of absences might not appear in the company's records.

But regardless of this, it was for the jury to determine whether or not Mahoney was able to follow a substantially gainful occupation continuously. This means was he physically and mentally able to work to the satisfaction of a reasonable employer. Employment given the man because of sympathy does not defeat his right to recover. Furthermore, it was necessary to constantly direct this veteran and employment under constant direction will not refute total and permanent disability. Asher v. United States, 63 F. (2d) 20, (C. C.A. 8) and United States v. Newcomer, 78 F. (2d) 50 (C.C.A. 8).

It is obvious from this record that a man with a physical disability such as Mahoney had, could not perform labor. The only thing that remained would be clerical work, something involving the use of intelligence. In his opening statement, Mr. Dillon, of counsel for the Government, said:

> "* * * It is admitted and is common sense, which you will gather very quickly, that at no time of course could Mr. Mahoney do physical labor of any heavy degree. His activities were of necessity confined to what we call sedentary, light, or office work, * * *." (R. 399)

The Government recognized this and gave the veteran vocational training, tried to make a bookkeeper out of him. Government doctors in commenting on this in October, 1935, said:

> "He had vocational training in 1922 but was never able to take the proper advantage of this training." (R. 193).

This means, and it is so evident from the record, that Mahoney had at the time of his discharge a severe permanent physical disability. On top of that he had a severe permanent mental disability and the combination prevented him from doing physical labor and also from working at any job that required the use of mental processes. There was no work that he could do to the satisfaction of a reasonable employer. Therefore, the trial judge was right in overruling the Government's motion for a directed verdict.

The attorneys who wrote appellant's brief comment on plaintiff's alleged failure to offer proof of plaintiff's ward's activities subsequent to the year 1922 (page 34). We cannot believe that the Government lawyers who tried this case would have urged any such proposition had this brief been entrusted to their care, since it was admitted at the trial that:

> "As a matter of fact Mr. Mahoney has done practically no work since his graduation from vocational training." (R. 399)

Admittedly there was but one period of employment since the war. This was proved and covered by numerous witnesses for both sides. Then came vocational training with the results shown in the Government doctor's report (R. 193) from which we quote:

> "He had vocational training in 1922 but was never able to take the proper advantage of this training."

To cover the period from vocational training to confinement in the Oregon State Hospital for the Insane, we presented testimony from the veteran's family showing that no work was done by veteran to their knowledge and that his condition continued as previously described. The written records, i. e., Government medical reports, were introduced.

It was manifestly impossible to put plaintiff's ward on the stand; his wife was presented, examined and questioned as far as counsel felt her condition would permit, then she was submitted to cross-examination. It is significant that this cross-examination was very brief and contained no questions about Mahoney's activities beyond those mentioned above. The court and jury saw Mrs. Mahoney and gauged her veracity and mental and physical condition. It is urged that plaintiff offered, under these circumstances, all that could be produced.

Plaintiff's case involves a man who sustained a broken back and a serious head injury while in service. Appellant's counsel concede that his injuries were serious and permanent. Army doctors at discharge found he was eighty per cent disabled. Sympathy and American Legion activity secured the only job he ever had after service. Government's attempt to rehabilitate him through vocational training was a failure. Since November 11, 1918, he has been physically and men-

tally sick and a proper subject for medical and hospital care. Under this record we have a jury question as to whether or not his policy of war risk insurance matured by reason of being permanently and totally disabled at the time of his discharge from the army.

We believe we are sustained in this view by the reasoning found in Hoisington v. United States, 127 F. (2d) 476 (C.C.A. 2) from which we quote:

> "Whether the plaintiff was totally and permanently disabled before the lapse of his policy is essentially a question of fact to be determined by the jury, and a proper regard for the fundamental right of trial by jury requires an appellate court to support the jury's verdict unless it is entirely clear that the evidence fails to sustain it. In the case at bar there was not only testimony of laymen, including the plaintiff himself, but also medical evidence from which the jury could find that from the date of his discharge from the army he was suffering from a nervous, neurasthenic condition. * * * His disability has been progressive and continuous. That it satisfies the definition of 'permanent' is not seriously questioned, and could not be. See Lumbra v. United States, 290 U.S. 551, 560, 54 S. Ct. 272, 78 L. Ed. 492. Whether his disability satisfies the definition of 'total' is not so clear. That occasional work for short periods by one generally disabled by impairment of mind or body does not as a matter of law negative total permanent disability may not be doubted. Berry

v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945; Lumbra v. United States, 290 U.S. 551, 561, 54 S. Ct. 272, 78 L. Ed. 492. But in the case at bar it appears that the plaintiff worked from January 10, 1925, to May 15, 1936, a total of 36 two-week periods. In 25 of these he worked full time (12 days), in 4 he lost but one day, and in the remaining 7 he lost a total of less than one-third of full time. After a five month lay-off in the summer of 1936, the reason for which does not appear, he was reemployed at increased wages and worked consecutively for 22 two-week periods, in more than half of which he worked full time and in none of which did he lose more than two days. Such extended periods of continuous labor after the critical date tend to support the appellant's contention that as a matter of law the insured was not totally disabled before May 31, 1919. Some years ago this court would quite likely have so ruled. In United States v. McDevitt, 2 Cir., 90 F. (2d) 592, at page 595, we said that 'A man who can hold jobs for ten and sixteen months at a stretch, is not 'totally disabled,' even though he must give up for a season and seek work anew.' But recent decisions of the Supreme Court indicate very clearly that the issue of total permanent disability should be left for decision by the jury under proper instructions, rather than determined by the judges. Berry v. United States, 312 U.S. 450, 61 S. Ct. 637, 85 L. Ed. 945; Halliday v. United States, Jan. 19, 1942, 315 U.S. 94, 62 S. Ct. 438,

86 L. Ed. . . . ; see also Jacobs v. City of New York, March 30, 1942, 314 U.S. . . ., 62 S. Ct. 854, 86 L. Ed. . . . . In the Berry case a decision adverse to the veteran was reversed because the evidence as a whole would justify the jury in finding that since his injuries he never had been, and would not thereafter be, able 'to work with any reasonable degree of regularity at any substantially gainful employment.' The Halliday case, where the disability resulted from impairment of mind, as in the case at bar, is to similar effect. In the light of these recent authoritative opinions we find no error in submitting the case at bar to the jury and allowing its verdict to stand * * *."

CONCLUSION

It is respectfully submitted that this appeal should be dismissed because of appellant's refusal and failure to include in the record on appeal, all of the evidence produced at the trial of this case.

In the event that this Court does not dismiss this appeal, it is respectfully submitted that there was substantial evidence showing that William V. Mahoney was an insane person prior to July 3, 1931 and further, was permanently and totally disabled on and prior to August 31, 1920 and that, accordingly, the judgment should be affirmed.

ALLAN A. BYNON,
GERALD J. MEINDL,
Attorneys for Appellee.

October, 1943.

No. 10458

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

PORTLAND TRUST AND SAVINGS BANK, A CORPORATION, GUARDIAN OF THE ESTATE OF WILLIAM V. MAHONEY, INCOMPETENT, APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

CARL C. DONAUGH,
United States Attorney.

FRANCIS M. SHEA,
Assistant Attorney General.
LESTER P. SCHOENE,
Director, Bureau of War Risk Litigation.
WILBUR C. PICKETT,
Assistant Director, Bureau of War Risk Litigation.
KEITH L. SEEGMILLER,
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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

PETITION FOR REHEARING

Comes now the United States of America, appellant in the above-named case, and petitions the court for a rehearing and assigns as reasons therefor the following:

(a) The theory of the Government's case seems clearly not to have been considered by the court. The opinion appears consistent with the view—rejected in all war risk cases in which it has been openly considered—that yearly renewable term insurance is matured by a partial permanent disability having its inception while the insurance is in force and progressing to the degree of total permanent disability after expiration of insurance protection. The Government's

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position that a verdict in its favor should have been directed rests upon the rule frequently set forth in war risk insurance cases, and stated in *Wilks* v. *United States,* 65 F. (2d) 775, 776 (C. C. A. 2), as follows:

> To establish his right to recover, he must prove that he was totally and permanently disabled while his policy was in force. Granted that when discharged from the army he had a disease which was certain to incapacitate him in the future, partially at first and totally in time, such proof is insufficient. A condition of both total and permanent disability must exist before his policy lapsed. * * *

Perhaps the leading case on the point is *Falbo* v. *United States,* 64 F. (2d) 948 (C. C. A. 9), affirmed *per curiam,* 291 U. S. 646, in which a permanent disability, total during the period of insurance protection, was held not to mature the contract because the totality of disability was not shown to have been permanent until insurance protection had expired. See also: *United States* v. *Hainer,* 61 F. (2d) 581, 583 (C. C. A. 9); *Cochran* v. *United States,* 63 F. (2d) 61, 62 (C. C. A. 10); *United States* v. *Gwin,* 68 F. (2d) 124, 126 (C. C. A. 6).

(b) The considerations motivating the decision in *Hoisington* v. *United States,* 127 F. (2d) 746 (C. C. A. 2), and invoked in support of the decision in this case, have been shown by recent decisions of the Supreme Court not to be well founded.

(c) Failure of the Government to except to the instructions to the jury was improperly invoked in support of the decision in this case that the Govern-

ments's motion for a directed verdict was properly denied.

MEMORANDUM IN SUPPORT OF PETITION

The Government is influenced in the filing of this petition less by concern over the disposition of a single case, regarded as wrongly decided, than by an appearance of departure from the long-established principles set forth in the cases on which the Government relied in this appeal.

(a) The opinion fails to disclose consideration of the theory of the Government's case, namely, that although the insured's mental condition may have had its inception while the insurance was in force, and may then have been both permanent and progressive, it was not shown to have become totally disabling during the period of insurance protection, or, indeed, prior to the onset of epileptic seizures, about 1932. Failure to consider the Government's theory of the case is indicated by the opinion, not only because of the lack of any reference to it, but more clearly by the evidence expressly relied upon by the court as contrasted with the evidence not referred to.

The opinion recites, and emphasizes, the testimony of Dr. Evans that in his opinion impairment of the insured's mind—deterioration—existed while the insurance was in force, that deterioration is permanent and for that reason worse than a psychotic condition which sometimes is curable. But the evidence showed also the absence of any proof that mental deterioration is totally disabling from its inception and the positive medical testimony that it is only a *reduction* in mental capacity (R. 384). Moreover, persistent

effort to elicit an opinion from Dr. Evans that something more serious than mere inception of deterioration arose while the insurance was in force (R. 244–251) was unsuccessful.

Specific reference is made in the opinion to the testimony of Dr. Finley that the insured was of unsound mind while his insurance was in force. But the opinion omits reference to the fact that Dr. Finley explained upon cross-examination that by "unsound mind" he meant only "an alteration either in * * * judgment, behavior, memory, or emotional reactions" (R. 275)—words not descriptive of total disability.

Lay testimony pertaining to the insured's conduct while the policy was in force is relied upon in the opinion as tending to show the then existence of some mental abnormality, but the opinion does not refer to the testimony of the same witnesses to the effect that the symptoms described by them were not regarded as indicative of total disability, ie., that he was not insane (R. 86) or irritable to the point of being unpleasant (R. 84); that his personality was changed but not "entirely" changed (R. 95), and that his nonsociability when he was home on furlough was explainable on the ground that by reason of the then exisiting physical illness he spent a great deal of time at home in bed (R. 88–89, 97).

The concession of Government counsel that the insured was totally permanently disabled at the time of trial and for several years prior thereto is referred to in the opinion—in connection with the testimony of Mrs. Mahoney that her husband's condition appeared to be about the same in 1920 as at the time of

trial, except for the seizures—as though it constituted ample justification for the verdict. But the exception in the testimony of Mrs. Mahoney goes to the heart of the Government's case. The concession that the insured had been totally permanently disabled for some time prior to trial was based upon the fact that during recent years, clearly not earlier than 1932, he suffered severe and frequent epileptic seizures. The testimony of Mrs. Mahoney, possibly tending to show the inception of mental abnormality while the insurance was in force, shows the non-existence at that time of the condition admitted by the Government to have caused total permanent disability in recent years. Her testimony and the concession on behalf of the Government may properly be regarded as supplementing each other to show the existence, while the insurance was in force, of the condition later causing total permanent disability, but they tend also to emphasize the absence of total disability while the insurance was in force.

The total lack of significance attributed by the court to the proof that the insured completed a course of vocational training in accountancy is inconsistent, we believe, with an awareness of the theory of the Government's case. If he was able to complete such course of training he was not then totally disabled, since the successful pursuit of such training is the full equivalent of the successful pursuit of a substantially gainful occupation. *Burbage* v. *United States,* 80 F. (2d) 683 (C. C. A. 5); *Blair* v. *United States,* 47 F. (2d) 109 (C. C. A. 8); *Edwards* v. *United States,* 2 Fed. Supp. 49 (D. C. Mass.). Com-

pare *United States* v. *Kerr,* 61 F. (2d) 800, 805 (C. C. A. 9); *Nichols* v. *United States,* 68 F. (2d) 597, 598 (C. C. A. 9).

A recitation in a case history report that the insured was unable to take proper advantage of his training, regarded as sufficient to support an inference that he was disabled, is consistent with the apparent basis of the decision—continued existence of a disability having its inception while the insurance was in force. It constitutes no answer, however, to the Government's position that the permanent disability was not total while the insurance was in force, while the fact of completion by the insured of a course in accountancy during a period of two and one-half years is one of the facts preventing an inference that he was totally disabled during that time.

(b) The considerations motivating the decision in *Hoisington* v. *United States,* 127 F. (2d) 476 (C. C. A. 2d), and invoked in support of the decision in this case, have been shown by recent Supreme Court decisions not to be well founded. It was stated in the *Hoisington case* (pp. 477–478) that—

> Such extended periods of continuous labor after the critical date tend to support the appellant's contention that as a matter of law the insured was not totally disabled before May 31, 1919. Some years ago this court would quite likely have so ruled. In *United States* v. *McDevitt,* 2 Cir., 90 F. 2d 592, at page 595, we said that "A man who can hold jobs for ten and sixteen months at a stretch, is not 'totally disabled,' even though he must give up for a season and seek work anew." But recent decisions of the

> Supreme Court indicate very clearly that the issue of total permanent disability should be left for decision by the jury under proper instructions, rather than determined by the judges. *Berry* v. *United States,* 312 U. S. 450, 61 S. Ct. 637, 85 L. Ed. 945; *Halliday* v. *United States,* Jan. 19, 1942, 315 U. S. 94, 62 S. Ct. 438, 86 L. Ed. ——; see also *Jacobs* v. *City of New York,* March 30, 1942, 314 U. S. ——, 62 S. Ct. 854, 86 L. Ed. ——. * * *.

That the rule governing direction of a verdict had not been changed, as supposed by the court in that case, has now been made clear. Supreme Court decisions rendered after the decision in the *Hoisington* case show that the views attributed by the Circuit Court of Appeals in that opinion to the Supreme Court were in fact the views only of a minority of the Justices of the Supreme Court. See *Galloway* v. *United States,* 219 U. S. 372, in which in the minority opinion the rule applied in the *Hoisington* case is contended for, but in which the majority opinion shows adherence to the rule, thought by the court in deciding the *Hoisington* case to have been abandoned. See also, *Bailey* v. *Central Vermont Ry.,* 319 U. S. 350; *Pence* v. *United States,* 316 U. S. 332; *De Zon* v. *American President Lines,* 318 U. S. 661, affirming a decision of this court, 129 F. (2d) 404. It is clear, we believe, that a different result would be reached in the *Hoisington* case if it were to come on for decision now in the light of the Supreme Court decisions here cited.

(c) Appellate review of a District Court's ruling denying a motion for a directed verdict is not affected by the instructions given to the jury and we believe

it was plainly improper in the present case to predicate an inference adverse to the Government, as the opinion indicates was done, upon its failure to except to the instructions to the jury. Indeed, we have no quarrel with the instructions given in this case. Our position is that the evidence fails to sustain the burden described by the instructions.

CONCLUSION

We respectfully submit that a rehearing should be granted.

CARL C. DONAUGH,
United States Attorney.

FRANCIS M. SHEA,
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LESTER P. SCHOENE,
Director, Bureau of War Risk Litigation.

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KEITH L. SEEGMILLER,
Attorney, Department of Justice.

MARCH 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

No. 10505

United States
Circuit Court of Appeals
For the Ninth Circuit.

LINDA H. HALE,

Appellant.

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the Southern Division of the United States District Court for the Northern District of California

Action at Law

No. 22344-S

LINDA H. HALE,

Plaintiff,

vs.

CLIFFORD C. ANGLIM, individually and as Collector of Internal Revenue for the First District of California,

Defendant.

COMPLAINT TO RECOVER TAXES PAID

Plaintiff complains of defendant and for cause of action alleges that:

I.

At all times herein mentioned, Defendant Clifford C. Anglim was the duly qualified, appointed and acting Collector of United States Internal Revenue for the First District of California, and at all times herein mentioned was and now is a citizen of the State of California residing in the Northern Judicial District of California.

II.

This is a cause of actual controversy of a civil nature arising under a law of the United States providing for Internal Revenue, to wit, Section 22

of the Revenue Act of 1936 enacted June 22, 1936, (49 Stat. 1648) as amended by the Revenue Act of 1937 (50 Stat. 813). [1*]

III.

On or about the 14th day of March, 1938, there was duly and regularly made and filed with defendant on behalf of plaintiff her United States Treasury Department Form 1040, Individual Income Tax Return, for the calendar year 1937, which said Form 1040 reflected net income in the amount of Fifty Seven Thousand Sixteen and 73/100 ($57,016.73) Dollars. The amount of income tax shown to be payable on said Form 1040 filed by plaintiff for the calendar year 1937 was Eleven Thousand Seven Hundred Ninety four and 53/100 ($11,794.53) Dollars. Plaintiff paid to defendant in three (3) installments during the calendar year 1938, all of the tax shown to be due by plaintiff's Individual Income Tax Return Form 1040 for the calendar year 1937, to wit, Eleven Thousand Seven Hundred Ninety four and 53/100 ($11,794.53) Dollars.

IV.

Plaintiff erroneously and improperly included in the gross income reported by plaintiff in her said Individual Income Tax Return for the calendar year 1937, an amount of Six Thousand Two Hundred Thirty ($6,230.00) Dollars received by plaintiff pursuant to the provisions of an agreement dated June 18, 1937, between plaintiff and her son, Prentis Cobb

*Page numbering appearing at foot of page of original certified Transcript of Record.

Hale, Jr., which said agreement is referred to in more detail hereinafter in Paragraph V of this complaint. Neither said sum of Six Thousand Two Hundred Thirty ($6,230.00) Dollars nor any part thereof constitutes gross income of plaintiff subject to the tax under the Revenue Act of 1936 enacted June 22, 1936 (49 Stat. 1648) as amended by the Revenue Act of 1937 (50 Stat. 813).

V.

With respect to the said agreement dated June 18, 1937 between plaintiff and her son, Prentis Cobb Hale, Jr., and referred to in Paragraph IV hereof, plaintiff alleges as follows: Plaintiff's husband, Prentis Cobb Hale, Sr., died testate on November 21, 1936. [2] Thereafter on January 4, 1937 in proceedings duly taken and had in the Superior Court of the State of California, in and for the City and County of San Francisco and numbered 74,152 in the Probate Department thereof, the last will and testament of said Prentis Cobb Hale, Sr. was admitted to probate and as executors therof, there were appointed A. P. Giannini, Prentis Cobb Hale, Jr., the son of plaintiff, and plaintiff herein. Subsequent to her appointment as one of the executors of the estate of Prentis Cobb Hale, Sr., Deceased, plaintiff asserted a right to a substantial share of the estate of Prentis Cobb Hale, Sr. upon the ground that she, the said plaintiff, had a community interest in a large portion of said decedent's estate. The said community property claim of plaintiff was settled and compromised by the transfer to plaintiff of certain real

property, certain shares of stock and dividends on said shares in the amount of Six Thousand Two Hundred Thirty ($6,230.00) Dollars, which said last mentioned amount is referred to in Paragraph IV hereof. The transfer to plaintiff of said real property, shares of stock and dividends thereon as herein in this Paragraph V specified was made under and pursuant to the provisions of that certain agreement between plaintiff and Prentis Cobb Hale, Jr. dated June 18, 1937 and referred to in Paragraph IV hereof, which said agreement reads in part as follows on pages 6 and 7 thereof:

> "Whereas, the said Linda Hoag Hale claims and asserts that a large portion of the property, purported to be devised and bequeathed by the said Prentis Cobb Hale, Sr. by his said last will and testament, was and is the community property of her said husband, Prentis Cobb Hale, Sr., and herself, and that she, as the surviving wife of her said husband, is entitled, under the laws of the State of California, to one-half of the said property, and the amount and extent of the community property to which the said Linda Hoag Hale is entitled, as aforesaid, have been controverted by the said Prentis Cobb Hale, Jr. in his individual capacity and as executor of the said last will and testament of the said Prentis Cobb Hale, Sr.; and
>
> "Whereas, the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., desire to compromise and [3] settle the said controversy without litigation, and to that end desire to establish the

fair net value of the said community property at the time of the death of the said Prentis Cobb Hale, Sr.;"

VI.

In addition to the sum of Six Thousand Two Hundred Thirty ($6,230.00) Dollars referred to in Paragraphs IV and V hereof, plaintiff erroneously and improperly included in the gross income reported by plaintiff on her United States Treasury Department Form 1040, Individual Income Tax Return, for the calendar year 1937 an amount of Five Thousand Four Hundred Fifty ($5,450.00) Dollars. Said last mentioned sum of Five Thousand Four Hundred Fifty ($5,450.00) Dollars represents dividends on shares of stock of Hale Bros. Stores, Inc. and Hale Real Estate Company received by the estate of Prentis Cobb Hale, Sr., Deceased, during the period intervening between the death of said Prentis Cobb Hale, Sr. and the distribution of the shares of said Hale Bros. Stores, Inc. and the shares of said Hale Real Estate Company to the trustees named in a testamentary trust created pursuant to the thirteenth paragraph of the last will and testament of the said Prentis Cobb Hale, Sr. Said testamentary trust created by the last will and testament of said Prentis Cobb Hale, Sr. was not a trust for maintenance and did not provide that the income from said trust should be paid to plaintiff from and after the date of death of said Prentis Cobb Hale, Sr. The amount of Five Thousand Four Hundred Fifty ($5,450.00) Dollars, although paid to plaintiff constituted gross income of the state of Prentis Cobb Hale, Sr. which

was received during the period of administration of said estate, and neither said sum of Five Thousand Four Hundred Fifty ($5,450.00) Dollars nor any part thereof constituted gross income of plaintiff subject to tax under the Revenue Act of 1936, enacted June 22, 1936 (49 Stat. 1648) as amended by the Revenue Act of 1937 (50 Stat. 813). [4]

VII.

On or about the 8th day of March, 1941, plaintiff duly and regularly and in the manner provided by law filed with defendant her verified claim for refund of Three Thousand Seven Hundred Fifty Seven and 93/100 ($3,757.93) Dollars representing the amount of Federal income tax heretofore paid to defendant with respect to said amounts of Six Thousand Two Hundred Thirty ($6,230.00) Dollars and Five Thousand Four Hundred Fifty ($5,450.00) Dollars erroneously and improperly included in plaintiff's gross income for the calendar year 1937.

VIII.

On or about November 12, 1941, the Commissioner of Internal Revenue of the United States rejected said verified claim for refund heretofore filed by plaintiff and refused to refund to plaintiff said Three Thousand Seven Hundred Fifty-Seven and 93/100 (3,757.93) Dollars or any part thereof, and neither said sum of Three Thousand Seven Hundred Fifty Seven and 93/100 ($3,757.93) Dollars nor any part thereof nor interest thereon has been repaid to plaintiff or otherwise credited to plaintiff.

Wherefore, Plaintiff prays judgment against defendant for the sum of Three Thousand Seven Hundred Fifty Seven and 93/100 ($3,757.93) Dollars, together with interest thereon as provided by law, for plaintiff's costs of suit incurred herein, and for such other relief as may be meet and proper in the premises.

Dated this 20th day of October, 1942.

L. W. WRIXON

Attorney for Plaintiff. [5]

(Duly Verified Oct. 20, 1942, by Linda H. Hale.)

[Endorsed]: Filed Oct. 22—1942. [6]

[Title of District Court and Cause.]

ANSWER

Now comes the defendant, appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and answers the complaint as follows:

I.

Admits the allegations of Paragraphs I, II and III of the complaint.

II.

Answering Paragraph IV of the complaint, defendant admits that in plaintiff's 1937 return, she included as taxable income the sum of $6,230.00 received by her pursuant to the terms of the agreement referred to in Paragraph IV of the com-

plaint. Denies all the remaining allegations of Paragraph [7] IV of the complaint.

III.

Admits the allegations of Paragraph V of the complaint.

IV.

Answering Paragraph VI, defendant denies the allegation that inclusion of the income paid by the trustees of the Estate of Prentis Cobb Hale, Senior, in her tax return was erroneous or improper. Denies the allegation that said income ($5,450.00) was income of the said estate. Denies the allegation that said money did not constitute part of the gross income of the plaintiff. Admits the remaining allegations of fact in said paragraph. In so far as said Paragraph alleges conclusions of law, defendant neither admits nor denies them.

V.

Answering Paragraph VII, defendant denies that plaintiff's inclusion of said items in her tax return as gross income was erroneous or improper. Admits that plaintiff filed a claim for refund in the sum of $3,757.93, as alleged in Paragraph VII.

VI.

Admits the allegations of Paragraph VIII of the complaint.

Wherefore defendant prays that judgment may be entered in his favor, for his costs, and for such other relief as may be just.

FRANK J. HENNESSY
United States Attorney,
ESTHER B. PHILLIPS
Assistant United States
Attorney

Receipt of Service.

[Endorsed]: Filed, Dec. 19, 1942. [8]

[Title of District Court and Cause.]

L. W. WRIXON

Merchants Exchange Building
San Francisco, California
Attorney for Plaintiff

FRANK J. HENNESSY

United States Attorney

ESTHER B. PHILLIPS

Assistant United States Attorney
Post Office Building
San Francisco, California
Attorneys for Defendant

OPINION

St. Sure, District Judge:

Plaintiff sues to recover $3,757.93 which she

claims she erroneously paid to defendant Collector as income [9] tax for 1937. In her tax return plaintiff reported the sums of $6,230 and $5,450, representing dividends on stocks distributed to her upon a compromise agreement under the order of the State probate court, and by the trustee of a testamentary trust respectively. The questions for decision are (1) whether the sum of $6,230, received as dividends by plaintiff, is exempt from taxation under §22(b)(3) of the Revenue Act of 1936, and (2) whether the sum of $5,450, also received as dividends, constitutes a taxable distribution from a testamentary trust.

Plaintiff is the widow of Prentis Cobb Hale, Sr. who died testate in San Francisco on November 21, 1936. He left surviving him his widow and their only child, Prentis Cobb Hale, Jr. Decedent's estate consisted of real and personal property of the value of about $2,000,000. His will was admitted to probate and plaintiff was appointed executrix and Prentis Cobb Hale Jr. and A. P. Giannini were appointed executors and each qualified as such. Testator declared that he believed that all of the property he owned was his separate property, but provided that if any of his property should be found to be community property, "and if my said wife shall elect to take any portion thereof under the community laws of the state, then I direct that the property and estate hereinafter set apart in trust for her use during her lifetime be reduced in amount by the appraised

value of the community property and estate which she shall elect to take."

Article thirteenth of decedent's will created a trust, the net income from which was to be paid to plaintiff during the term of her natural life with remainder over to [10] decedent's and plaintiff's son, Prentis Cobb Hale, Jr. upon the death of plaintiff. The following described property was designated by article thirteenth to be held in trust:

(1) Home at 2430 Vallejo Street, San Francisco, California; (2) building at 2436 Vallejo Street, San Francisco, California; (3) a farm near Woodside, San Mateo, California; (4) a 2-acre tract of land at Shasta Springs, California; (5) 18,000 shares of capital stock of Hale Bros. Stores, Inc.; (6) 200 shares of capital stock of Hale Real Estate Company; (7) 200 shares of the capital stock of First National Bank of San Jose. (This stock was disposed of by decedent prior to his death.); (8) 8,000 shares of capital stock of Transamerica Corporation.

Plaintiff was dissatisfied with the terms of the will, asserting that a large portion of the property of the estate devised and bequeathed in trust by her late husband was property in which she had a community interest under the laws of California. A controversy about the matter between plaintiff and her son resulted in a compromise agreement, determining that the value of the community exceeded the sum of $680,000 and that the fair market value of one-half thereof to which plaintiff was entitled was in excess of $340,000.

As a result of the compromise agreement, dated June 18, 1937, only a portion of the property of the estate remained a part of the testamentary trust created by article thirteenth of the will. The property devised and bequeathed to the testamentary trust actually was distributed as follows:

To plaintiff under the terms of the compromise [11] agreement: All of the real property referred to in Article Thirteenth; 8,000 shares of Hale Bros. Stores, Inc.; 2,000 shares of Transamerica Corporation; 150 shares of Hale Real Estate Company.

To Prentis Cobb Hale, Jr. as residuary legatee: 6,000 shares of Transamerica Corporation.

To the testamentary trustee under the trust created by article thirteenth of decedent's will: 10,000 shares of Hale Bros. Stores, Inc.; 50 shares of Hale Real Estate Company.

The income under discussion here is in two items. The first relates to the sum of $6,230 representing dividends collected on 6,000 shares of Hale Bros. Stores, Inc., 2,000 shares of Transamerica Corporation and 150 shares of Hale Real Estate Company. The stock of this item is a portion of the stock described in article thirteenth which testator sought to dispose of therein. The dividends amounting to $6,230 were collected by the executors of the estate and credited to the trust. Both the stock and the income were later distributed to plaintiff by virtue of the trust and the compromise agreement.

The executors did not pay the income tax on these dividends which they included in their tax returns

for 1937, but they took a deduction, pursuant to 162(c) of the Revenue Act of 1936, which reads as follows:

> "In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the [12] estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir or beneficiary."

The second item relates to the sum of $5,450, representing dividends collected on 10,000 shares of Hale Bros. Stores, Inc., and 50 shares of Hale Real Estate Company. This stock is what remained of the property in the testamentary trust after pliantiff, through the compromise agreement, had carved out her share of the community. The income from this stock, in the amount named, had likewise been collected by the executors and credited to the trust. The income was distributed directly to plaintiff under the provisions of §162(c) of the Revenue Act of 1936, supra, and consequently no income tax was paid upon it by decedent's estate. The payment was "allowed as an additional deduc-

tion in computing the net income of the estate or trust'' for the taxable year.

As to the first item of $6,230, representing dividends received, plaintiff contends that it is exempt from taxation under the provisions of §22(b)(3) of the Revenue Act of 1936 which provides in part:

> "The following items shall not be included in the gross income and shall be exempt from taxation:
>
> "Gifts, bequests, and devises. The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income)."

Plaintiff further contends that the sum of $6,230 "represents an integral part of the total settlement in lieu of her claimed community interest and no distinction can be [13] drawn between the principal portion of the settlement relating to real estate and securities and the accumulated dividends thereon under the principle established in Lyeth v. Hoey, 59 S. Ct. 155; 305 U. S. 188; 83 L. ed. 119."

It should be kept in mind that we are here concerned only with dividends from shares of stock, which was income paid to plaintiff after her husband's death, following the probate of his will. All of the stock from which the income was derived was bequeathed in trust to a trustee for the use and benefit of plaintiff during her natural life. Upon the death of testator and the proof of the will the title to the stock was in the testamentary trustee subject to administration of the estate.

The income derived from property held in trust relates back to the date of testator's death. Its status is fixed at that time, and the beneficiary is entitled to income derived from the specific property placed in trust. McCaughn v. Girard Trust Co., 19 F. (2d) 218, Estate of White, 41 Bd. of Tax App. 525 and Estate of Fox, 31 Bd. of Tax App. 1181. A specific bequest carries with it all accessions by way of dividends or interest that may accrue after the death of the testator. Estate of Daly, 202 Cal. 284, 287; 69 C. J. pages 401, 402, 1151, 1153. It is immaterial whether the dividends came from stock which originally was part of decedent's estate, or from stock accepted in lieu of a claimed community interest under a compromise agreement. After the admission of the will to probate, under the compromise agreement, plaintiff had released from [14] the terms of the trust to herself in her individual capacity, certain property, a portion of which was income-producing stock here involved. In this instance she got both the stock and the income derived from it.

Plaintiff cites Lyeth v. Hoey, supra, as supporting her contention that the dividends she received were not taxable, but an examination of that case shows the facts are different from those in the present case. There the heir, by threatened litigation and compromise agreement secured a settlement and distribution to him of property valued at $141,484.63, which was part of decedent's estate and was included in the estate's tax return. After the heir received the property the Commissioner

of Internal Revenue treated the whole amount of value as income for the year in which it was received and levied an additional tax of $56,389.65. The court held that this was illegal; that what the petitioner "got from the estate came to him because he was heir, the compromise serving to remove pro tanto the impediment to his inheritance," and that the exemption applied.

The rule of Lyeth v. Hoey would apply here if the Commissioner had treated the whole of the property distributed to plaintiff in 1937, valued at $340,000, as income. But that he did not do. The property was part of decedent's estate upon which an inheritance tax was assessed and paid. Income or earnings from the property of the decedent's estate were not subject to an inheritance tax but to an income tax.

It seems clear to me that the dividends received by plaintiff from the stock of which she became the owner [15] following her husband's death, either through compromise agreement followed by decree of distribution, or through testamentary trust, are taxable as income. Cf. Rosenberg v. Commissioner, 115 F. (2d) 910.

Plaintiff did not receive the dividends by gift or bequest or devise or inheritance (§22(b)(3) of Revenue Act of 1936), but she received them as income from property which had been distributed to her in the manner hereinbefore stated.

Plaintiff takes an equivocal position as to the second item of $5,450, representing dividends from stock remaining in the testamentary trust, which

dividends were paid by the trustee to plaintiff during the taxable year. She states that she was not entitled to receive these dividends under Estate of Brown, 143 Cal. 450, and Clayes v. Nutter, 49 Cal. App. 148, and that the fact that she did receive $5,450 does not render it taxable to her under the decision in Freuler v. Helvering, 291 U. S. 35.

What has been said under item one as to the status of trust property and income therefrom also applies here. The trustee made payment of the income to plaintiff as authorized by §162(c) of the Revenue Act of 1936, supra. The cases cited are not in point and plaintiff's position is untenable.

Judgment will be in favor of defendant with costs.

April 27, 1943

[Endorsed]: Filed Apr. 28, 1943. [16]

[Title of District Court and Cause.]

ORDER FOR JUDGMENT AND SUBMISSION OF FINDINGS OF FACT AND CONCLUSIONS OF LAW

Ordered:

That plaintiff take nothing by her action and that defendant have judgment for his costs.

Attorney for defendant may submit findings of

fact and conclusions of law in accordance with the opinion this day filed.

Dated: April 27, 1943.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Apr 28, 1943. [17]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled case coming regularly on for trial on February 9, 1943, before the above entitled Court, the Honorable A. F. St. Sure, presiding, the plaintiff appearing by L. W. Wrixon, the defendant appearing by Frank J. Hennessy, United States Attorney for the Northern District of California, and Esther B. Phillips, Assistant United States Attorney, jury having been waived, and the Court having considered the pleadings, the exhibits and the testimony, and the cause having been submitted upon briefs, and the Court having considered the facts, the law and the arguments of counsel, and having rendered his opinion thereon, now makes the following [18]

FINDINGS OF FACT

I.

That at all times herein mentioned, Clifford C. Anglim, was the duly qualified, appointed and act-

ing Collector of Internal Revenue for the First District of California, and at all times mentioned was and is a citizen of the United States and a resident of the State and Northern District of California.

That at all times mentioned herein the plaintiff was and now is a resident of the City and County of San Francisco, State and Northern District of California.

II.

On March 14, 1938, the plaintiff filed with the defendant her income tax return for the year 1937. Said return reflected a net taxable income in the sum of $57,016.73 and an income tax thereon in the sum of $11,794.53. The plaintiff duly paid to the defendant in three installments during the year 1938 all of the tax shown to be due in said return.

III.

On or about March 8, 1941, plaintiff duly filed with the defendant her claim for refund of income taxes in the sum of $3,757.93, which plaintiff claimed represented the amount of income tax paid to the defendant upon certain items of income which she claimed to have been erroneously included in her income tax return for the year 1937. On November 12, 1941, the Commissioner of Internal Revenue rejected said claim for refund and refused to refund said tax of $3,757.93, or any part thereof. No part of said taxes has been refunded or otherwise credited to the plaintiff.

IV.

The items of income which plaintiff included in her income tax return for the year 1937, and which she claims [19] ought not to have been included in said return, were dividends amounting to $6,230.00 and $5,450.00 which were paid on stocks owned by her deceased husband at the date of his death, and which accrued and were paid after his death, under the circumstances hereinafter set forth.

V.

Plaintiff is the widow of Prentis Cobb Hale, Senior, who died November 18, 1936, leaving an estate subject to federal estate taxes of the approximate value of $2,000,000.00. In addition to legacies not involved herein, he made his son the residuary legatee and left his wife the income from a trust established by Clause 13 of his will. In Clause 13, he bequeathed to the Bank of America, as trustee, certain houses and furnishings in San Francisco and certain parcels of real property situated in other parts of California, and, in addition, 18,000 shares of capital stock of Hale Bros. Stores, Inc., 200 shares of capital stock of Hale Real Estate Company, and 8,000 shares of capital stock of Transamerica Corporation. Said trustee was to hold the trust estate for the benefit of the plaintiff and to pay the income therefrom during her life and on her death the trust estate was to be distributed to her son, Prentis Cobb Hale, Jr., who was also the residuary legatee of the estate. All

of said property was included in the estate tax return of the estate for estate tax purposes.

Plaintiff was dissatisfied with the terms of the will and asserted that a portion of the property of the estate devised by her husband was property in which she had a community interest under the laws of the State of California. A controversy about the matter between the plaintiff and her son resulted in a compromise agreement between them by which it was agreed that plaintiff had a community interest in property of her deceased husband amounting to more than $680,000 and that the fair market value of one-half thereof to which plaintiff was entitled exceeded $340,000. The [20] decedent's will directed that in the event that plaintiff asserted a claim to a community interest in his property, the value of her community interest should be taken from the property bequeathed by Clause 13 of his will.

As a result of said compromise agreement and said provisions in the will, there was distributed to the plaintiff all of said real property and furnishings referred to in Clause 13, and 8,000 shares of Hale Bros. Stores, Inc., 2,000 shares of Transamerica Corporation and 150 shares of Hale Real Estate Company, and there was distributed to the residue of the estate 6,000 shares of Transamerica Corporation. As a result of this agreement the testamentary trust created in Clause 13 received in trust only 10,000 shares of Hale Bros. Stores, Inc. and 50 shares of Hale Real Estate Company. A decree of distribution was entered on July 14, 1937,

distributing to the plaintiff the above described properties, and a decree of distribution was entered on July 29, 1937, distributing to the trustee said trust properties.

VI.

Previous to the distribution made on July 14, 1937, dividends amounting to $6,230.00 accrued between the death of the decedent and July 14, 1937 upon said stocks distributed to Mrs. Hale. These dividends were paid from time to time to the executors of the estate by the issuing corporations and the executors credited them to the trust up to July 14, 1937. Thereafter the executors distributed these dividends to the plaintiff pursuant to a partial decree of distribution and pursuant to the compromise agreement referred to above.

VII.

Previous to the distribution to the trustee on July 29, 1937, dividends accrued upon those shares of stocks which were distributed to the testamentary trust in the amount of $5,450.00. Said dividends accrued between the date of death [21] and July 29, 1937, when the Bank of America became the distributee of the shares of stock as trustee. The executors had received these dividends from time to time and had credited them to the trust. They were thereafter paid to the plaintiff who, by the terms of Clause 13 of the will, was entitled to receive all income from the trust property during her lifetime.

VII.

The executors in their income tax return for

the estate reported all of these dividends, but deducted them as having been properly distributed to the beneficiary entitled to receive them. The plaintiff included all of these dividends in her tax return and paid the taxes on them. These are the taxes which she now seeks to recover.

From the foregoing facts the Court makes the following

CONCLUSIONS OF LAW

(1) That the executors of the estate and the fiduciary (the trustee) were, under the terms of the will, authorized to credit and to distribute both items of income in question to the beneficiary of the trust, the plaintiff.

(2) That the executors were entitled to deduct from the income tax return of the estate these dividends so credited and paid, and were not required to pay the income taxes upon them.

(3) That the plaintiff, being the beneficiary and the person properly receiving said dividends, was required by the provisions of Section 162(c) of the Revenue Act of 1936, to return the dividends as a part of her income and to pay the taxes upon them.

Let judgment be entered for the defendant, with costs as may be taxed.

A. F. ST. SURE
United States District Judge.

Dated: May 10, 1943

[Endorsed]: Filed May 10, 1943. [22]

In the Southern Division of the United States District Court for the Northern District of California.

No. 22344-S

LINDA H. HALE,

Plaintiff,

vs.

CLIFFORD C. ANGLIM, individually and as Collector of Internal Revenue for the First District of California,

Defendant.

JUDGMENT

This cause having come regularly on for trial and the Court having rendered his opinion upon the evidence and having made Findings of Fact and Conclusions of Law,

Now, Therefore, it is Hereby Ordered, Adjudged and Decreed that the plaintiff recover nothing by her complaint and that the defendant recover costs as may be taxed.

Dated: May 12, 1943.

A. F. ST. SURE
United States District Judge.

[Endorsed]: Filed May 13, 1943. [23]

[Title of District Court and Cause.]

TESTIMONY

Thursday, February 9, 1943

Appearances:

L. W. Wrixon, Esq.,
Attorney for the plaintiff;

Miss Esther B. Phillips,
Assistant United States Attorney,
for the defendant.

Mr. Wrixon: If your Honor please, this is a proceeding involving the Federal income tax liability of the plaintiff. Practically all of the evidence will be documentary in form, but in order to state a little of the background I will state some of the pertinent facts.

The plaintiff in this proceeding is the surviving wife of Prentiss Cobb Hale, Sr. Mr. Hale passed away on November 21, 1936. He died testate in the City and County of San Francisco and his will was probated in San Francisco. By Article 13 of his will he created a testamentary trust, the life income to go to the plaintiff, and the remainder to his son. The will also gave [26] certain relatively small bequests to the plaintiff. The will was offered for probate and the plaintiff asserted a community interest in the property of the decedent's estate. A compromise agreement was entered into between the plaintiff and her son, Prentiss Cobb Hale, Jr. This agreement resulted in the transfer to the plaintiff of a considerable fortune of the

trust property that would otherwise have become a part of the testamentary trust pursuant to Article 13 of his will. The agreement also provides that the income from the property distributed to Mrs. Hale for a period of time commencing from the date of his death to the date of distribution be also distributed to the plaintiff.

The plaintiff, in addition to the property and the income to which I have just referred, also received income from the remaining portion of the property which was distributed to the trustee under the testamentary trust.

There are two problems in this case, one relating to the taxability of the amount received by the plaintiff under the property settlement agreement, relating to the income on the securities which were given to her by the agreement, and the other question is relative to the taxability of the amount received by the plaintiff from the income on the property which did go into the testamentary trust.

The plaintiff contends that the income paid to her under the property settlement agreement is not income under Section 22 of the Revenue Act of 1936, but is income arising out of property acquired by inheritance. And the plaintiff contends that the other amount, $5,450, received by her, arising out of income of the property that did go into the trust, is not taxable to her by reason of the decisions of the Supreme Court and Appellate Court of the State of California relating to income received by a [27] trustee upon property distributed under the testamentary trust.

The Court: As I understand, the husband died testate; and he left certain property to the widow, and he left certain property to the son. The property left to the son was in trust.

Mr. Wrixon: In trust as to the remainder, under Article 13 of his will, and the son was also the residual legatee under the will.

The Court: Then thereafter the son transferred, by virtue of an agreement, the trust property to his mother.

Mr. Wrixon: A portion of it.

The Court: A portion of the trust property to his mother, and the income therefrom.

Mr. Wrixon: The income accruing from the date of January 1, 1937, to the date of the agreement.

The Court: Was it a gift from the son to the mother?

Mr. Wrixon: No, your Honor; it was taken by the plaintiff and transferred from the estate of Prentiss Cobb Hale in settlement of her claim of the community interest in the estate of her husband.

The Court: As I understand it, the property did not go to the widow by reason of any provision of the will or any provision of the law, did it?

Mr. Wrixon: That is our contention, your Honor.

The Court: That it did?

Mr. Wrixon: That it did not go to the widow by reason of any provision of the will, but rather went

to her solely as a compromise of her asserted community interest in the estate.

The Court: The balance of the matter has to do with income on the remaining portion of the present estate received by the widow? [28]

Mr. Wrixon: Yes, your Honor, on the remaining portion of the present estate, consisting of 10,000 shares of Hale Bros. Stores, Inc., and 50 shares of Hale Real Estate Company. Those two blocks of securities did go into the testamentary trust, and certain income was received by the estate during the period from the date of his death to the date the securities were distributed to the trustee. That income amounted to $5,450 and was ultimately paid to the plaintiff.

It is our contention under the decisions in California with respect to income accruing prior to the date property is distributed to a testamentary trustee that it is not taxable as income of life tenancy.

The Court: Aren't you bound by the Federal law in that regard?

Mr. Wrixon: It is our contention, your Honor, that the law of California governs in that respect, in that it determines to whom income shall be paid during that period.

The Court: Very well.

Miss Phillips: Counsel has stated the two items in controversy correctly; that is, the first concerns dividends which were paid upon shares of stock which the plaintiff received pursuant to her claim that part of the estate of her deceased husband was community property. We have a situation here

where, as the records will show, the deceased left about a two million dollar estate; his wife and he had been married for more than 30 years. His will, which will be placed in evidence, left her an outright gift of some $10,000 and the income for life upon a testamentary trust, in addition to leaving her a home and some things like that. Thereafter the will was probated. The plaintiff contended part of the property in the estate was really community property, of which [28a] part was hers and was not subject to be left by her husband.

The son and she had a dispute. They finally reached a conclusion that in the two million dollar estate, approximately $680,000 was, in fact, community property, of which $340,000 would be hers under the laws of California.

There was a dispute, but at the same time, pursuant to the agreement, and pursuant to the recognition by the son of the fact that part of the estate was community property, it was agreed that $340,000 of the property in the estate should go to the wife and mother as her community property; that pursuant to this agreement a block of stock was transferred to her and did not go into the estate for probate purposes. It became hers.

Now, in this block of property of approximately $340,000, there were shares of stock on which dividends became payable and which plaintiff received. This is the fruit, you might say.

The Court: Who shall pay the tax on that income?

Miss Phillips: Who shall pay the tax on that

income? The estate did not get the income; the estate did not pay the income tax. The plaintiff got the fruit. Which shall pay the tax on it?

The second item is the block of stock which went into the testamentary trust, which the will sets up, which would be held for the lifetime of the plaintiff, and upon her death the testamentary trust would become the son's property.

On this block of stock in the testamentary trust dividends of $5,450 were paid into the trust. The fiduciary turned that money over to Mrs. Hale.

Now, your Honor, she returned this as her income and thereafter filed a claim for refund, and says, "This is not taxable to me." But who should pay the tax on it? If the plaintiff did not pay the tax on it, then, of course, the trustee of the estate, or [29] executors, of whom plaintiff hereself was one, owe the tax. Somebody has to pay the tax on it. Should it have been her, as beneficiary of the trust, or should it have been the trustee? Who should pay the tax on it?

The Court: You say the widow got it?

Miss Phillips: The widow got it as income as beneficiary of this testamentary trust. We claim that it was properly taxable to her under the statutory provisions and under the regulations. Somebody has to pay the tax. Either she must pay it, or the estate must pay it.

The Court: I do not suppose she claims the trustee should pay it?

Miss Phillips: If she does not pay it, the trus-

tees pay it; one or the other must pay it. Those are the only two questions in controversy.

As counsel stated, the proof is almost wholly documentary evidence. It is a matter of construction, your Honor.

The Court: Very well.

Mr. Wrixon: If your Honor please, I would like to offer in evidence certain documents which have been submitted to counsel, and I will ask that they be considered as read.

The Court: Very well.

Mr. Wrixon: I will offer in evidence a copy of a claim for refund filed by the plaintiff, asking for a refund of $3,757.93, applicable to the taxable year 1937.

Miss Phillips: No objection.

The Court: It may be admitted and marked.

(The document referred to was marked Plaintiff's Exhibit No. 1 in evidence.)

PLAINTIFF'S EXHIBIT No. 1

CLAIM

To Be Filed with the Collector Where Assessment Was Made or Tax Paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

[ ] Refund of Tax Illegally Collected.

[ ] Refund of Amount Paid for Stamps Unused, or Used in Error or Excess.

[ ] Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp
(Date Received)

State of California
City and County of San Francisco—ss:
[Type or Print]
Name of taxpayer or purchaser of stamps—Mrs. Linda H. Hale
Business address .....
(Street) (City) (State)
Residence—2430 Vallejo street San Francisco California

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed—First California

2. Period (if for income tax, make separate form for each taxable year) from Jan. 1., 1937, to Dec. 31, 1937

3. Character of assessment or tax—individual income tax

4. Amount of assessment, $11,794.53; dates of payment (3-14-38 $2,948.64; 6-7-38 $2,948.64;)

5. Date stamps were purchased from the Government (9-1-38 $5,897.25)

6. Amount to be refunded Three Thousand Seven Hundred Fifty-seven and 93/100 $3,757.93

7. Amount to be abated (not applicable to income or estate taxes) ..... $.....

8. The time within which this claim may be legally filed expires, under Section 322 I.R.C., on March 15, 1941

The deponent verily believes that this claim should be allowed for the following reasons:

Reasons are stated by the memorandum (4 pages) which is attached hereto and made a part hereof.

This claim has been prepared by me, and the statements made therein I either know to be true, or are based upon facts of which I have been informed and believe to be true.

(Signed) L. M. WRIXON
L. W. Wrixon

(1) Linda H. Hale, hereinafter referred to as Taxpayer, is the surviving wife of Prentis Cobb Hale, Sr., and one of the 3 executors of his last will and testament. Mr. Hale died on November 21, 1936. His estate is still being probated in San Francisco under proceeding #74,152.

(2) Mr. Hale declared in his will that he believed all of his property was his separate property. He left to Taxpayer, without qualification, $10,000.00 and all automobiles which he might own. He also created a trust in his will involving certain real estate and securities, the income of said trust to be paid to Taxpayer during her lifetime and

upon her death the principal balance was then to be paid to their son, Prentis Cobb Hale, Jr.

(3) (a) Taxpayer contested the contention of her husband regarding the separate character of his property, and as a result a compromise agreement was entered into between Taxpayer and her son on June 18, 1937, the purpose of this agreement being to settle amicably and without litigation their conflicting claims. Under the terms of this agreement Taxpayer was entitled to receive outright from the trust property certain real estate and the following securities:

8,000 Shs.	Hale Bros. Stores, Inc.
2,000 Shs.	Transamerica
150 Shs.	Hale Real Estate Company
1,220 Shs.	Hale Bros. Realty

(b) After the foregoing securities were released, together with other securities distributable to Taxpayer's son, there remained in the trust created by Mr. Hale, Sr., the following securities:

10,000 Shs.	Hale Bros. Stores Inc.
50 Shs.	Hale Real Estate Company

(4) Article 8 of the agreement dated June 18, 1937 specifically provided that all dividends theretofore declared on the above mentioned shares released to Mrs. Hale (paragraph 3(a) above) should also be paid to Taxpayer as a part of the settlement. Accordingly, dividends aggregating $6,230.00 which had been received by the Estate of Prentis Cobb Hale, Sr. on the securities to be re-

leased to Taxpayer were paid over to Taxpayer by the estate in 1937 and were reported by Taxpayer on line 7 of her return for the year 1937. An analysis of these dividends follows:

On 8,000 Shs. Hale Bros. Stores, Inc.:	
March 1, 1937, 25c per sh.	$2,000.00
June 1, 1937 do	2,000.00
On 2,000 Shs. Transamerica Corpn.:	
Feb. 1, 1937, 20c per sh.—cash	400.00
40 Shs. Bancamerica Blair Co. stock, at $12.00 per sh.	480.00
On 150 Shs. Hale Real Estate Co.:	
Jan. 2, 1937, $3.00 per sh.	450.00
Mar. 24, 1937 do	450.00
June 21, 1937 do	450.00
Total	$6,230.00

(6) In addition to dividends in amount of $6,230.00 referred to in Paragraph (4) taxpayer also received in 1937 pursuant to a decree of ratable distribution dated December 22, 1937 the sum of $5,450.00 representing dividends which had accrued upon the shares of stock referred to in paragraph (3)(b) hereof which remained in the trust created by Mr. Hale in his will. These securities were distributed to trustees on or about said date of July 29, 1937. An analysis of the dividends comprising the sum of $5,450.00 is as follows:

10,000 Shs. Hale Bros. Stores, Inc.	
March 1, 1937 25c	$2,500.00
June 1, 1937 25c	2,500.00
50 Shs. Hale Real Estate Company	450.00
Total	5,450.00

Taxpayer repeats and reaffirms the argument presented above in subdivision (c) of Paragraph 5 with respect to the dividends amounting to $5,450.00 and contends that this amount which has been reported by Taxpayer (line 7—Income from Fiduciaries, in the year 1937) should be excluded from taxable income for the reasons hereinabove mentioned in Paragraph (5)(c).

[Endorsed]: Filed 2/9/43.

Mr. Wrixon: I also offer in evidence a photostatic copy of an [30] agreement dated June 18, 1937, between Linda Hoag Hale, in her invidiual capacity and as executrix of the last will and testament of Prentiss Cobb Hale, Sr., and Prentiss Cobb Hale, Jr., in his individual capacity and as executor of the last will and testament of Prentiss Cobb Hale, Sr.

Miss Phillips: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 2 in evidence.)

PLAINTIFF'S EXHIBIT No. 2

This Agreement, made and entered into this 18th day of June, 1937, by and between Linda Hoag Hale, (sometimes also known as Linda H. Hale), in her individual capacity and as executrix of the last will and testament of Prentis Cobb Hale, Sr., deceased, the party of the first part, and Prentis Cobb Hale, Jr., (sometimes also known

as Prentis C. Hale, Jr.), in his individual capacity and as executor of the last will and testament of the said Prentis Cobb Hale, Sr., deceased, the party of the second part,

"Seventeenth: I have heretofore created and declared an irrevocable trust of which Bank of Italy National Trust and Savings Association is now the Trustee, in which I have placed 8716 shares of the capital stock of Hale Bros. Stores, Inc. and 3970 shares of the capital stock of Hale Bros. Realty Co., to be held for the use and benefit of my wife, Linda Hoag Hale, during her lifetime, and for the use of my son, Prentis Cobb Hale, Jr., after her death, and I hereby ratify and approve said trust in each and every particular";

and Bank of Italy National Trust and Savings Association, so named in the said paragraph "Seventeenth", is now known and is the same as the said Bank of America National Trust and Savings Association, to wit, the trustee of the trusts declare in and by the said paragraph "Thirteenth" of the said last will and testament; and

Whereas, the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., desire to compromise and settle the said controversy without litigation, and to that end desire to establish the fair net value of the said community property at the time of the death of the said Prentis Cobb Hale, Sr.; and

Whereas, the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., have examined, and have caused to be examined, the books and records of the said Prentis Cobb Hale, Sr., and have ascer-

tained and determined, from such examination, that the fair net value of the said community property at the time of the death of the said Prentis Cobb Hale, Sr. is not less than and greatly exceeds the sum of $680,000, and, therefore, that the fair net value of the one-half interest therein to which the said Linda Hoag Hale is entitled under the laws of the State of California, as the surviving wife of the said Prentis Cobb Hale, Sr., is not less than and greatly exceeds the sum of $340,000;

Now, Therefore, This Agreement Further Witnesseth:

That, for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., and to that end of establishing the fair net value of the said community property at the time of the death of the said Prentis Cobb Hale, Sr., and in consideration thereof, and in further consideration of the covenants and agreements hereinafter in this agreement contained on the part of the said Linda Hoag Hale, in her individual capacity and as executrix aforesaid, and of the said Prentis Cobb Hale, Jr., in his individual capacity and as executor aforesaid, respectively, to be performed, the said Linda Hoag Hale, in her individual capacity and as executrix aforesaid, and the said Prentis Cobb Hale, Jr., in his individual capacity and as executor aforesaid, do hereby accept, as so determined, the said sum of $340,000 as the fair net value, for all purposes of this agreement, of the said one-half interest in the said community prop-

erty at the time of the death of the said Prentis Cobb Hale, Sr., to which the said Linda Hoag Hale is entitled under the laws of the State of California, as the surviving wife of the said Prentis Cobb Hale, Sr., and the said Linda Hoag Hale, in her individual capacity and as executrix aforesaid, and the said Prentis Cobb Hale, Jr., in his individual capacity and as executor aforesaid, do hereby respectively covenant and agree as follows:

1. There shall be released to the said Linda Hoag Hale, in her individual capacity, from the provisions of the said paragraph "Thirteenth" of the said last will and testament, and, therefore, from the trust estate created in and by those provisions, the following respective items of property, real and personal, at the respective values at which the same will be appraised in the said inventory and appraisement, to wit:

Vallejo Street real property, San Francisco, Cal.,	$ 25,000.00
Woodside real property, San Mateo Co., Cal.,	34,672.00
Shasta Springs real property, Siskiyou Co., Cal.,	7,000.00
8,000 shares of Hale Bros. Stores, Inc.,	176,000.00
2,000 shares of Transamerica Corporation,	36,000.00
150 shares of Hale Real Estate Company,	43,200.00
Total,	$321,872.00
Forward,	$321,872.00
And to these enumerated items of property there shall be added, from the residue of the estate of the said decedent such number of the shares of Hale Bros. Realty Company, a corporation, as shall equal, at value at which the same shall be appraised in the said inventory and appraisement, the sum of	16,800.00
Total,	$338,672.00

and the said items of property, real and personal, shall be distributed to the said Linda Hoag Hale by the decree of partial distribution, as hereinafter provided, in the said matter of the estate of the said Prentis Cobb Hale, Sr., in satisfaction of the said one-half interest in the said community property to which the said Linda Hoag Hale is entitled as aforesaid.

2. There shall remain in the trust estate created in and by the provisions of the said paragraph "Thirteenth" of the said last will and testament, and subject to the said provisions, the following respective items of property, at the respective values at which the same will be appraised in the said inventory and appraisement as follows, to wit:

10,000 shares of Hale Bros. Stores, Inc.	$220,000.00
50 shares of Hale Real Estate Company,	14,000.00
Total,	$234,000.00

3. There shall also be released from the said trust estate created in and by the provisions of the said paragraph "Thirteenth" of the said last will and testament, the 6,000 shares, remaining after the release, as aforesaid, from the provisions of the said paragraph "Thirteenth", of the said 2,000 shares, of the capital stock of the said Transamerica Corporation, at the value thereof at which the same will be appraised in the said inventory and appraisement, to wit, the sum of $108,000, and the same shall be and become a part of the residue of the estate of the said decedent, to which the said Prentis Cobb Hale, Jr. is entitled under the pro-

visions of the said paragraph "Fifteenth" of the said last will and testament.

8. All dividends heretofore declared by the respective corporations, or by any thereof, hereinabove in the said paragraph 1 of this agreement named, upon their said shares of capital stock described in the said paragraph 1, or upon any thereof, and heretofore paid to and received by the said executrix and the said executors of the said last will and testament, and all dividends hereafter declared by the said respective corporations, or by any thereof, upon their shares of capital stock described in the said paragraph 1, or upon any thereof, when and as the same shall be paid to and received by the said executrix and the said executors, shall be credited by the said executrix and the said executors on the books of the said executrix and the said executors to the said Linda Hoag Hale, individually, (and the said credits heretofore made on the said books of the said executrix and the said executors as aforesaid shall be changed accordingly), and all items of expenditure, properly made by the said executrix and the said executors for the said Linda Hoag Hale, individually, including all items of expenditure incurred by the said executrix and the said executors for the care, maintenance and protection of the said items of real and personal property referred to in subdivisions 1, 2, 3 and 4, respectively, of the said paragraph "Thirteenth" of the said last will and testament, shall be charged by the said executrix and the said executors to the said Linda

Hoag Hale, individually, and the balance, if any of the said dividends remaining shall be distributed to the said Linda Hoag Hale, individually, by the said decree of final distribution, or by a decree of partial distribution, pursuant to the petition therefore to the said Superior Court in the said matter of the estate of the said Prentis Cobb Hale, Sr., of the said Linda Hoag Hale, as the executrix, and the said A. P. Ginnini and Prentis Cobb Hale, Jr., as the executors, of the said last will and testament.

9. All dividends heretofore declared by the said Transamerica Corporation upon the 6,000 shares of the capital stock of the said Transamerica Corporation, hereinabove in the said paragraph 3 of this agreement referred to, and heretofore paid to and received by the said executrix and the said executors of the said last will and testament, and all dividends hereafter declared by the said Transamerica Corporation upon the said 6,000 shares of the said capital stock of the said Transamerica Corporation, when and as the same shall be paid to and received by the said executrix and the said executors, shall be credited by the said executrix and the said executors on the books of the said executrix and the said executors to the said Prentis Cobb Hale, Jr., individually, and any items of expenditure properly made by the said executrix and the said executors for the said Prentis Cobb Hale, Jr., individually, shall be charged by the said executrix and the said executors to the said Prentis Cobb Hale, Jr., individually, and the balance, if any, of the said dividends shall be distributed to the said Prentis Cobb Hale, Jr., individually, by the said decree of final distribution.

10. The said sum of $1,500 per month, until the further order of the said Superior Court, allowed by the said Superior Court by its order duly given and made in the said matter of the estate of the said Prentis Cobb Hale, Sr., on the 4th day of January, 1937, retroactively commencing on the date of the death of the said decedent, to wit, on the 21st day of November, 1936, shall terminate and be pro-rated as of the date of the said order and decree of partial distribution to the said Linda Hoag Hale; provided, however, that if the said petition for partial distribution shall not have been heard and determined by the said Superior Court on or before the 20th day of July, 1937, for any reason attributable to the said Linda Hoag Hale, or to her attorneys, the said allowance shall terminate and be pro-rated as of the said 20th day of July, 1937.

[Endorsed]: Filed 2/9/43.

Mr. Wrixon: I also offer in evidence a certified photostatic copy of the last will and testament of Prentiss Cobb Hale, Sr.

Miss Phillips: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 3 in evidence.)

PLAINTIFF'S EXHIBIT No. 3

LAST WILL AND TESTAMENT

Fourth: I believe and declare that all property which I own, or in which I have any interest, is my own separate property, but if any property in which

I may be interested at the time of my death shall be found to be community property, and if my said wife shall elect to take any portion thereof under the community property laws of this State, then I direct that the property and estate hereinafter set apart in trust for her use during her lifetime be reduced in amount by the appraised value of the community property and estate which she shall elect to take.

Fifth: I give and bequeath to my sister, Jennie Hale Fisher, if she survives me, Five Hundred (500) shares of the capital stock of Hale Bros. Stores, Inc., and Two Hundred (200) shares of the capital stock of Transamerica Corporation.

Twelfth: I give and bequeath to my beloved wife, Linda Hoag Hale, if she survive me, to be paid and delivered to her at the earliest possible moment after my death, the sum of Ten Thousand (10,000) Dollars, and all automobiles which I may then own.

Thirteenth: If my said wife, Linda Hoag Hale, survive me, I give, devise and bequeath to Bank of America National Trust and Savings Association, a national banking association, as Trustee, subject to the conditions aforesaid, to be held and administered in trust, for the use and benefit of my said wife during the period of her natural life, and thereafter to be applied to the uses hereinafter mentioned, the following real and personal property, to-wit:

1— My home at No. 2430 Vallejo Street, San Francisco, California, together with the entire lot

and parcel of land upon which it stands, and the furniture, furnishings and personal effects therein contained.

2— The building at No. 2446 Vallejo Street, San Francisco, California, together with the entire lot and parcel of land upon which it stands, and the furniture, furnishings and personal effects therein contained.

3— My farm near Woodside, in the County of San Mateo, State of California, including the buildings and improvements thereon, and all the furniture, furnishings and personal effects thereon and therein contained, including the equipment used in and about the operation of said farm.

4— The 2-acre tract of land owned by me at Shasta Springs, in the County of Siskiyou, State of California, including the buildings thereon, and the furniture, furnishings and personal effects therein contained.

5— Eighteen thousand (18,000) shares of the capital stock of Hale Bros. Stores, Inc., a Delaware corporation.

6— Two hundred (200) shares of the capital stock of Hale Real Estate Company, a California corporation, having its office and principal place of business at Sacramento, California.

7— Two hundred (200) shares of the capital stock of First National Bank of San Jose, a banking corporation.

8— Eight thousand (8,000) shares of the capital stock of Transamerica Corporation, a corpora-

tion organized and existing under the laws of the State of Delaware.

During its continuance the trust shall be administered in the manner, for the uses and purposes and subject to the conditions following, to-wit:

a— If it be the wish of my said wife to occupy, as her home, the house in which we now live, it shall be her right and privilege to do so, and my said Trustee shall permit her to live therein and to have the use of all the furniture, furnishings and personal effects therein contained without the payment of rental or other charge, and shall keep and maintain said property and pay the taxes and expenses of the upkeep thereof out of the income or any other funds in the trust.

b— The net income of the trust fund and estate shall be paid by my said trustee to my said wife during the term of her natural life in such monthly or other installments as shall be found most appropriate; provided, further, that if said income shall at any time be insufficient for the proper support or care of my said wife, or if, by reason of illness, accident or other emergency she shall be in need of additional funds, my said Trustee shall be authorized, in its discretion, to pay to her or to apply for her use from time to time, such portions of the principal of the trust fund and estate as my said Trustee shall deem necessary, and it shall not be competent for any other person, whether or not a beneficiary hereunder or interested in my estate, to object thereto.

c— Upon the death of my said wife, if my son Prentis Cobb Hale, Jr., be then living and over the age of twenty-five (25) years, or if he be then deceased, said trust shall cease and terminate and the residue of the property and fund held for the use and benefit of my said wife during her lifetime with any unapplied income thereof, shall be immediately paid over, conveyed, delivered and distributed to my said son, or to his issue if he be deceased, by right of representation.

d— If at the time of my said wife's death, my said son, Prentis Cobb Hale, Jr., be then living but has not reached the age of twenty-five (25) years, the said residue of said fund shall still be held by my said trustee, in trust, to collect the rents, issues and profits therefrom and apply the same for his use and benefit until he reaches the age of twenty-five (25) years, when the corpus of the said residue of my estate shall go to my said son, or in case of his death before reaching the age of twenty-five (25)years, to his issue by right of representation.

e— During the continuance of my trust my said Trustee shall take, collect and receive the rents, issues, profits, earnings and dividends of the trust property, real and personal, and shall pay therefrom the costs and expenses of the care, protection and upkeep of the trust property, including taxes, and the expenses of the trust.

Fifteenth: I give, devise and bequeath all of the rest, residue and remainder of all property and estate which I may own, or in which I may have any interest, or of which I may have any right or

power of testamentary disposition at the time of my death, whether real or personal and wheresoever situate, including any portion of my estate hereinbefore devised and bequeathed which shall fail of an identified or designated beneficiary, or which for any reason shall revert to and become a part of the residue of my estate, to my son, Prentis Cobb Hale, Jr.

Seventeenth: I have heretofore created and declared an irrevocable trust of which Bank of Italy National Trust and Savings Association is now the Trustee, in which I have placed 8716 shares of the capital stock of Hale Bros. Stores, Inc. and 3970 shares of the capital stock of Hale Bros. Realty Co., to be held for the use and benefit of my wife, Linda Hoag Hale, during her lifetime, and for the use of my son, Prentis Cobb Hale, Jr., after her death, and I hereby ratify and approve said trust in each and every particular.

[Endorsed]: Filed 2/9/43.

Mr. Wrixon: I also offer in evidence a certified photostatic copy of the decree of ratable distribution made and entered in the estate of Prentiss Cobb Hale, Sr., in the Superior Court of the City and County of San Francisco, State of California, No. 74,152, dated December 22, 1937.

Miss Phillips: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 4 in evidence.)

PLAINTIFF'S EXHIBIT No. 4

DECREE OF RATABLE DISTRIBUTION

It Is Hereby Ordered, Adjudged and Decreed that there be and there is hereby distributed to Linda Hoag Hale the sum of Five Thousand Seven Hundred and Fifty Dollars ($5,750.00) and Forty (40) shares of the capital stock of Bancamerica-Blair on account of income received by the said executrix and executors of the last will and testament of the decedent above named subsequent to January 1, 1937, and accrued on shares of stock heretofore distributed to the said Linda Hoag Hale under and pursuant to the terms of that certain decree of partial distribution made and entered herein on or about the 14th day of July, 1937;

It Is Hereby Further Ordered, Adjudged and Decreed that there be and there is hereby distributed to Bank of America National Trust and Savings Association, as trustee for Linda Hoag Hale, the sum of Five Thousand Four Hundred and Fifty Dollars ($5,450.00) on account of income received by the said executrix and executors and accrued on shares of stock heretofore distributed to the said trustee under and pursuant to the terms of that certain decree of ratable distribution made and entered herein on or about the 29th day of July, 1937, which said moneys are to be distributed to the said trustee to be held and administered by it pursuant to the terms and provisions of said trust, as more specifically set forth in the said decree of ratable

distribution made and entered on the 29th day of July, 1937.

[Endorsed]: Filed 2/9/43.

Mr. Wrixon: I also offer in evidence a decree of partial distribution made and entered in the estate of Prentiss Cobb Hale, Sr., in the Superior Court of the State of California, in and for the City and County of San Francisco, No. 74,152, dated July 14, 1937.

Miss Phillips: No objection.

(The document referred to was marked Plaintiff's Exhibit No. 5 in evidence.) [31]

PLAINTIFF'S EXHIBIT No. 5

DECREE OF PARTIAL DISTRIBUTION

"Fourth: I believe and declare that all property which I own, or in which I have any interest, is my own separate property, but if any property in which I may be interested at the time of my death shall be found to be community property, and if my said wife shall elect to take any portion thereof under the community property laws of this State, then I direct that the property and estate hereinafter set apart in trust for her use during her lifetime be reduced in amount by the appraised value of the community property and estate which she shall elect to take."

That the said petitioner has claimed and asserted that a large portion of the property purported to be

devised and bequeathed by the said decedent under the said last will and testament, was and is the community property of the said decedent and of the said petitioner; that the said petitioner, as the surviving wife of the said decedent was and is entitled, under the laws of the State of California to one-half of the said community property; that the amount and extent of the community property to which the said petitioner was and is so entitled have been controverted by the said Prentis Cobb Hale, Jr., in his individual capacity and as executor of the said last will and testament; that the said petitioner and the said Prentis Cobb Hale, Jr. desired to compromise and settle their said controversy without litigation and, to that end, the said petitioner, in her individual capacity and as executrix of the said last will and testament of the said decedent, and the said Prentis Cobb Hale, Jr., in his individual capacity and as executor of the said last will and testament of the said decedent, on the 18th day of June, 1937, entered into that certain agreement, dated the said 18th day of June, 1937, which agreement provides that the items of property, real and personal hereinafter particularly described, shall be distributed to the said petitioner, in satisfaction of the said one-half interest in the said community property to which the said petitioner was and is entitled; and that a copy of the said agreement is annexed to the said petition and is marked "Exhibit B" and is particularly referred to in the said petition and is incorporated therein by reference.

That the compromise and settlement agreed upon by the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., in and by the said agreement, dated the said 18th day of June, 1937, are in accordance with the provisions of the said paragraph "Fourth" of the said last will and testament; and that under and pursuant to the said paragraph "Fourth", the said petitioner is entitled to have the property hereinafter described distributed to her.

Now, Therefore, in consideration of the premises, It Is Hereby Ordered, Adjudged and Decreed that the said agreement be, and the same is hereby, approved; and

It Is Hereby Further Ordered, Adjudged and Decreed that, pursuant to the provisions of the said paragraph "Fourth" of the said last will and testament, and in accordance with the provisions of the said agreement, there be, and there is hereby, distributed to the said petitioner, Linda Hoag Hale, individually, the following described property:

4. Eight thousand (8,000) shares of the capital stock of Hale Bros. Stores, Inc., a Delaware corporation.

5. Two thousand (2,000) shares of the capital stock of Transamerica Corporation, a corporation organized and existing under the laws of the State of Delaware.

6. One hundred and fifty (150) shares of the capital stock of Hale Real Estate Company, a California corporation, having its office and principal place of business at Sacramento, California.

7. One thousand two hundred and twenty (1,220) shares of the capital stock of Hale Bros. Realty Company, a corporation.

[Endorsed]: Filed 2/9/43.

LEE SANFORD,

Called for the Plaintiff; Sworn.

Direct Examination.

Mr. Wrixon: Q. Mr. Sanford, you are associated wtih the Bank of America, National Trust & Savings Association, are you? A. I am.

Q. Will you state in what capacity you are employed?

A. I am assistant trust officer.

Q. Mr. Sanford, I show you a copy of Treasury Department Form 706, Federal-State Tax Return, which purports to represent a copy of the original return filed on behalf of Prentiss Cobb Hale, Sr., and particular Schedule 0-18. Will you state to the Court whether you prepared the original Form 706, Federal-State Tax Return, on behalf of the estate of Prentiss Cobb Hale, Sr.? A. I did.

Q. Will you state whether or not at the time the original Federal-State Tax Return was prepared any consideration was given to the question of whether a deduction should be taken for community property in the estate of Prentiss Cobb Hale, Sr.?

A. Yes, that question was considered.

(Testimony of Lee Sanford.)

Q. Will you state what decision you came to as a result of such consideration?

A. No attempt was made to exclude any portion of the estate.

Q. No deduction was taken on the original Federal-State tax return as filed, is that correct?

A. That is correct.

Q. Will you state whether or not any subsequent amended return or proceeding was taken directed toward obtaining a deduction for any such community property?

A. No such amended return was filed, nor was any attempt ever made.

Q. Will you state to the Court the amount of the gross estate of Prentiss Cobb Hale, Sr., as indicated by Schedule O on the Federal- [32] State tax return, valued as of the date of the death?

A. $1,998,321.99.

Q. Will you state to the Court the amount of deduction claimed on the Federal-State tax return filed on behalf of Prentiss Cobb Hale, Sr.?

A. $260,215.83.

Q. Mr. Sanford, I show you an agreement dated June 18, 1937, between Linda Hoag Hale and her son, Prentiss Cobb Hale, Jr., being Plaintiff's Exhibit 2 in evidence, and particularly Article 3 thereof, relating to 6,000 shares of Transamerica Corporation stock which are authorized to be distributed to Prentiss Cob Hale, Jr. I will also ask you to refer to Article 9 of Exhibit 2, stating that certain dividends on the 6,000 shares of Transamerica stock

(Testimony of Lee Sanford.)

should be distributed to Prentiss Coob Hale, Jr. I will ask you if you prepared a Federal income tax return on behalf of the estate of Prentiss Cobb Hale, Sr., for the calendar year 1937?

A. Yes, I did.

Q. I will ask you with respect to the dividend on the 6,000 shares of Transamerica stock, which are referred to in Article 3 of Exhibit 2, did you report the dividends on the 6,000 shares as being taxable to the plaintiff, Linda Hoag Hale?

A. I did not.

Miss Phillips: You say there was 6,000 shares distributed to Mr. Hale?

Mr. Wrixon: To Prentiss Cobb Hale, Jr.

Miss Phillips: I am not sure that I understood what the witness said.

The Court: Read the question and answer.

(Record read by the reporter.)

Miss Phillips: I do not see the purport of the answer to the question, but perhaps counsel can explain it. You asked if he [33] reported as taxable to Mrs. Hale the income on the 6,000 shares that were distributed to her son, and he said no, he did not.

Mr. Wrixon: That is correct.

Q. I will show you Plaintiff's Exhibit No. 4, a decree of ratable distribution, dated December 22, 1937, and particularly page 3 thereof, in which it is ordered that $5,450 be distributed to the trustee under the testamentary trust created in Mr. Hale's will. Do the dividends in the amount of $5,450

(Testimony of Lee Sanford.)

represented in Plaintiff's Exhibit 4, represent the dividend received by the estate of Prentiss Cobb Hale, Sr., subsequent to the date of his death and prior to July 29, 1937? A. Yes.

Q. Now, as to the date of July 29, 1937, which is referred to in the decree of ratable distribution, I will ask you, is the date of July 29, 1937, the date upon which the securities forming a part of the testamentary trust were distributed to the trustee under the testamentary trust? A. Yes.

Q. Do you know whether or not the shares distributed to the trustee under the testamentary trust consisted of 10,000 shares of Hale Bros. Stores, Inc., and 50 shares of Hale Real Estate Company?

A. That is right.

Q. Those were the securities that were distributed to the trustee on July 29, 1937, under the testamentary trust created by Mr. Hale in Article 13, were they not? A. That is right.

Mr. Wrixon: That is all.

Cross Examination

Miss Phillips: Q. Mr. Sanford, I take it that the Bank of America was one of the co-executors of the estate of Prentiss Cobb Hale?

A. No, the Bank of America was not one of the executors.

Q. Was it a trustee?

A. It was a testamentary trustee.

Q. You acted as testamentary trustee?

A. Yes. [34]

(Testimony of Lee Sanford.)

Q. In what capacity did you assist in preparing the State tax return?

A. The bank was appointed as a depositary of the estate. We had the facilities for doing it and fell heir to the job.

Q. Do you know Mr. Hale's age at the time of his death, approximately?

A. I believe about 76.

Q. During the last ten years of his life had he been in active business, or had he semi-retired?

A. No; quite active.

Q. He had been active? A. Yes.

Q. In making his State tax return was it possible for you to allocate how much of the property owned by Mr. Hale, Sr., he had acquired prior to July, 1927, and how much of the corpus of the estate he had acquired subsequent to July 1927 by his own efforts?

A. Well, we did not believe it possible.

Q. You believed it not to be possible to make that allocation? A. Yes.

Q. Then under the Federal estate rule as to community property acquired in California under California laws since July, 1927, it was not possible for you to ascertain how much of that community property was acquired for the benefit of Mrs. Hale after July of 1927, is that the substance of it?

A. We did not feel justified in attempting to exclude any of it.

Q. You could not determine it so you included it, is that right? A. Yes.

(Testimony of Lee Sanford.)

Q. I am still doubtful on the treatment of the dividends referred to by counsel in his direct examination on the Transamerica. Under the will 8,000 shares of Transamerica were to go into the testamentary trust; under the agreement 2,000 shares went to Mrs. Hale and 6,000 shares went to her son. Now, in preparing the return by the trustee of the income on those shares, can you state how you [35] treated them?

A. The 6,000 shares were diverted to the residue of the estate, and the dividends on that stock actually distributed were charged to the distributees.

Q. It is my recollection of the evidence that the 6,000 shares went to the son. Is that incorrect? You said the 6,000 shares of Transamerica went into the testamentary trust.

A. No, they did not go into the testamentary trust, but the son being the residual legatee, they were allocated to him, to the residue, so it would naturally fall to him.

Q. As I understand it now, it went into the residue of the estate? A. Yes.

Q. Then in the estate tax return for 1937 you reported the dividends on the 6,000 shares as going to the estate, is that right? A. Yes.

Q Counsel asked whether you reported that as income to the plaintiff and you said no. Now I ask you, did you treat that as income of the estate?

A. Yes.

Q. I see; that clears it up. I think that is all.

Mr. Wrixon: That is all.

J. GORDON HILL,

Called for the Plaintiff. Sworn.

Direct Examination

Mr. Wrixon: Q. Mr. Hill, you are a certified public accountant? A. I am.

Q. And you were a certified public accountant in the year 1937? A. I was.

Q. You are familiar with Mr. Hale's financial affairs, are you? A. I am.

Q. Did you personally prepare the Federal Income Tax Return on the [36] death of Mr. Hale for the calendar year 1937 and subsequent taxable years? A. I did.

Q. Mr. Hill, I will show you a claim for refund filed on behalf of the plaintiff, being Plaintiff's Exhibit 1 in evidence, and particularly page 2 thereof, listing certain dividends aggregating $6,230. I will also show you Plaintiff's Exhibit 2 in evidence, being an agreement dated June 18, 1937, and particularly Article 8 thereof, stating that certain dividends should be paid to the plaintiff, Linda Hoag Hale. After examining these two exhibits can you state to the Court whether or not the divivends list-state to the Court whether or not the dividends list-dends which are referred to in Article 8 of Plaintiff's Exhibit 2?

A. Yes, sir, they are.

Q. I will also ask you, Mr. Hill, whether the dividends in the amount of $6,230, which are referred to on page 2 of Plaintiff's Exhibit 1, represent dividends declared on shares of stock described

(Testimony of J. Gordon Hill.)

in Article 1 of Plaintiff's Exhibit 2 during the period January 1, 1937, and June 18, 1937—excuse me. I would like to change the question to read paid or declared during the period from January 1, 1937, to June 18, 1937?

A. They are the dividends on the same stock.

Q. They represent the dividends paid or declared between January 1, 1937, and June 18, 1937, is that correct? A. They do.

Q. By whom were those dividends originally received?

A. By the executor and executrix of the estate of Prentiss Cobb Hale, Sr.

Q. After the receipt they were paid over to the plaintiff pursuant to Article 8 of Plaintiff's Exhibit 2, is that correct? A. They were.

Q. I show you a decree of ratable distribution dated December 22, [37] 1937, being Plaintiff's Exhibit No. 4 in evidence, and particularly the bottom of page 2 and the top portion of page 3, by which it is ordered that there be distributed to the plaintiff $5,750 and 40 shares of the capital stock of Bancamerica—Blair, and I will ask you to review that portion of the decree. Will you state to the Court whether the dividends authorized to be distributed to the plaintiff under Plaintiff's Exhibit 4 in the amount of $5,750 and 40 shares of Bancamerica—Blair, represent the same dividends that are listed in Plaintiff's Exhibit 1, amounting to $6,230?

A. They do.

Q. Will you state to the Court how you reconcile

(Testimony of J. Gordon Hill.)

the amount of $5,750 in the decree of ratable distribution with the amount of $6,230 in plaintiff's claim for refund?

A. The sum of $5,750 was paid as dividends in cash. In addition to that there were paid the dividends in kind, 40 shares of the capital stock of Bancamerica-Blair, having a value of $12.00 per share, or a total of $480.

Q. So the total of $480 in value of the stock plus the $5,750 in cash equals the $6,230 represented by plaintiff's claim for refund, is that correct?

A. That is correct.

Q. I will ask you to state to the Court whether, in plaintiff's claim for refund, itemizing the $6,230, there are any dividends paid on the stock of Transamerica Corporation? A. There are.

Q. Will you state to the Court the dates of the dividend, and the amounts?

A. On February 1, 1937, there was paid or declared a dividend in cash of 20 cents per share, on 2,000 shares, making $400, and also 40 shares of Bancamerica-Blair stock at $12.00 per share, having a total value of $480.

Q. I will now show you Plaintiff's Exhibit 2, being an agreement dated June 18, 1937, and particularly Article 2 thereof, on page 8, [38] reciting that certain real property and shares of stock be distributed to the plaintiff. Were the properties which I have described in Article 1 actually distributed to the plaintiff, to your knowledge?

A. They were.

(Testimony of J. Gordon Hill.)

Q. I will also show you Plaintiff's Exhibit 2, Article 9, on page 13, which provides that certain dividends on 6,000 shares of Transamerica Corporation stock be distributed to Prentiss Cobb Hale, Jr. Were dividends on the 6,000 shares of Transamerica stock which were distributable to Prentiss Cobb Hale, Jr., reported in the income tax return of the plaintiff during the year 1937?

A. They were not.

Q. Were they reported by the plaintiff in any other taxable year? A. They were not.

Q. I will also show you Article 10 of Plaintiff's Exhibit No. 2, which provides that a monthly allowance in the sum of $1,500 per month be paid to the plaintiff, commencing as of the date of death of the decedent, and continuing until July 20, 1937. Will you state to the Court whether or not that family allowance of $1,500 per month was paid during the period from the date of death to July 20, 1937? A. It was paid to Mrs. Hale.

Q. Mr. Hill, will you state to the Court whether the plaintiff had any independent income of her own during the calendar year 1937 other than income received from or through the estate of Prentiss Cobb Hale, Sr.?

A. Yes, she had other income.

Q. Would you state to the Court the approximate amount of such other income?

A. About $18,000.

Q. What is the total amount of gross income re-

(Testimony of J. Gordon Hill.)

ported by Mrs. Hale on her individual income tax return for the calendar year 1937?

A. $59,241.06.

Q. What is the net income reported by Mrs. Hale on her 1937 Federal [39] income tax return?

A. $57,016.73.

Mr. Wrixon: That is all.

Cross Examination

Miss Phillips: Q. Of the total gross amount of which you say $18,000 represented income of her own, there was a considerable portion that she reported as fiduciary income, was there not?

A. Yes.

Q. As the beneficiary of the trust?

A. That is true.

Q. And that would include income from properties acquired during the lifetime of Mr. Hale not involved in this case at all?

A. That is correct.

Q. The income which Mrs. Hale received from the stock transferred to her by the executors was reported in her income tax return for 1937 under the head of fiduciary income, was it not?

A. It was.

Q. That is, it does not appear as separate items, but these two amounts in controversy here appear as fiduciary income on her own return?

A. That is correct.

Miss Phillips: I think that is all I have to ask Mr. Hill.

Mr. Wrixon: I have no further questions, your Honor. If your Honor desires, we can submit some oral argument at this time, or if you prefer, we will submit it on briefs, or both.

The Court: I do not care for any argument now if you are going to submit it on briefs.

Miss Phillips. I am not offering any evidence, but I would like the record to show a motion for judgment in the defendant's favor. I think counsel and I are prepared to argue it orally, but I think it would be better to submit briefs.

The Court: I do not know how extensive the briefs should be. It may only be necessary to make a brief statement of the fact and [40] cite the cases which the Court should consider.

Miss Phillips: Very well.

Mr. Wrixon: May the record show a motion for judgment on behalf of the plaintiff?

The Court: Yes.

How much time do you want?

Mr. Wrixon: May I have ten days?

The Court: Yes. How much time do you wish Miss Phillips?

Miss Phillips: Ten days.

Mr. Wrixon: And then may plaintiff have five days to reply?

The Court: Yes.

The case will be submitted on briefs, ten, ten, and five.

[Endorsed]: Filed Apr. 14, 1943. [41]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Linda H. Hale, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 13, 1943.

Dated: June 18, 1943.

L. W. WRIXON,
Attorney for Plaintiff.

[Endorsed]: Filed Jun 18, 1943. [42]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

The plaintiff, Linda H. Hale, hereby designates the complete record and proceedings in the above entitled cause for inclusion in the record on appeal of said cause to the Circuit Court of Appeals for the Ninth *District*.

Dated June 25, 1943.

L. W. WRIXON,
Attorney for Plaintiff.

Personal service of notice of the within Designation of Record on Appeal together with a copy thereof is admitted this 25 day of June, 1943.

FRANK J. HENNESSY,
United States Attorney.
By ESTHER B. PHILLIPS,
Assistant United States Attorney.

[Endorsed]: Filed June 29, 1943. [43]

[Title of District Court and Cause.]

STIPULATION AS TO CONTENTS OF RECORD ON APPEAL

It is hereby stipulated and agreed by and between the parties hereto that the following designated portions of the record in the above entitled cause shall constitute the record of said cause on appeal to the Circuit Court of Appeals for the Ninth Circuit:

(1) Complaint;
(2) Answer;
(3) Opinion;
(4) Order for Judgment;
(5) Findings of Fact and Conclusions of Law;
(6) Judgment;
(7) Notice of Appeal;
(8) Order for Delivery of Exhibits; [44]
(9) All Exhibits offered in evidence;
(10) Designation of Record on Appeal;
(11) All Orders extending Time to Docket Appeal;
(12) Reporter's Transcript;
(13) Stipulation as to Contents of Record on Appeal.

L. W. WRIXON,
Attorney for Plaintiff.
FRANK J. HENNESSY,
United States Attorney.
ESTHER B. PHILLIPS,
Assistant United States Attorney.

[Endorsed]: Filed Jun. 29, 1943. [45]

[Title of District Court and Cause.]

ORDER FOR DELIVERY OF EXHIBITS

To the Clerk of the Above Entitled Court:

You are hereby ordered to deliver to the Circuit Court of Appeals for the Ninth Circuit, for use in the appeal of the above entitled cause, all of the Exhibits offered in evidence on the hearing of this case.

Dated: June 19, 1943.

A. F. ST. SURE,
Judge of the United States
District Court.

[Endorsed]: Filed June 19, 1943. [46]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 46 pages, numbered from 1 to 46, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Linda H. Hale, Plaintiff, vs. Clifford C. Anglim, Etc., Defendant. No. 22344-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Seven-dollars and forty-cents ($7.40), and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 21st day of July, A. D. 1943.

[Seal] C. W. CALBREATH,
Clerk.
WM. J. CROSBY,
Deputy Clerk.

[Endorsed]: No. 10505. United States Circuit Court of Appeals for the Ninth Circuit. Linda H. Hale, Appellant, vs. Clifford C. Anglim, Individually, and as Collector of Internal Revenue for the First District of California, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 26, 1943.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10505

LINDA H. HALE,

Appellant,

vs.

CLIFFORD C. ANGLIM, individually and as Collector of Internal Revenue for the First District of California,

Appellee.

DESIGNATION OF THE RECORD TO BE PRINTED

It Is Hereby Stipulated that the following mentioned and designated portion of the record shall constitute the record to be printed on this appeal:

1. Complaint
2. Answer
3. Opinion
4. Order for Judgment
5. Findings of Fact and Conclusions of Law
6. Judgment
7. Notice of Appeal
8. Order for Delivery of Exhibits
9. Designation of Record on Appeal
10. All Orders extending Time to Docket Appeal
11. Reporter's Transcript
12. Stipulation as to Contents of Record on Appeal

13. Following mentioned portions of Refund Claim—(Exhibit 1):

a. Page 1 and paragraphs numbered 1, 2, 3, 4 and 6.

14. Following mentioned portions of Agreement dated June 18, 1937—(Exhibit 2):

a. Names of parties and capacities—page 1

b. Second paragraph on page 6 and all of pages 7, 8 and 9

c. Articles 8, 9 and 10 commencing on page 12 and continuing to top of page 14

15. Following mentioned portions of Last Will and Testament—(Exhibit 3):

a. Articles Fourth, Twelfth, Thirteenth, Fifteenth and Seventeenth

16. Following mentioned portions of Decree of Ratable Distribution dated December 2, 1937—(Exhibit 4):

a. Commencing with the last paragraph at bottom of page 2 and continuing to top of page 3 relating to distribution of $5,750. and 40 shares of Bancamerica-Blair stock and

b. Paragraph distributing $5,450. to Bank of America as trustee for Linda H. Hale.

17. Following mentioned portions of Decree of Partial Distribution dated July 14, 1937—(Exhibit 5):

a. Commencing with second paragraph on page 4 and continuing to and including second paragraph commencing on page 5, approving agreement of June 18, 1937

b. Third paragraph commencing on page 5, including however, only items numbered 4, 5, 6 and 7 of the said third paragraph, as shown on page 8

L. W. WRIXON,
Attorney for Appellant.
FRANK J. HENNESSY,
United States Attorney.
By [Illegible]
Asst. U. S. Atty.
ESTHER B. PHILLIPS,
Assistant United States Attorney.
Attorneys for Appellee.

[Endorsed]: Filed July 26, 1943. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY ON APPEAL

The first point upon which Appellant relies is:

I.

The amount of Six Thousand Two Hundred and Thirty ($6,230.00) Dollars received by Appellant in 1937 from the Estate of her deceased husband represented an amount paid to Appellant in compromise of contemplated litigation concerning Appellant's interest in the Estate of her deceased hus-

band, or in the alternative was received by Appellant as part of a compromised settlement of Appellant's claimed interest in the community property accumulated during the marriage of Appellant and her deceased husband and did not constitute taxable income to Appellant in the year 1937.

II.

The Second point upon which Appellant relies is:

The amount of Five Thousand Four Hundred and Fifty (5,450.00) Dollars received by Appellant in the year 1937 from the Estate of her deceased husband represented dividends received by the Estate of her deceased husband subsequent to the date of his death and prior to distribution of certain securities to the Trustee under a Testamentary Trust created by the Will of Appellant's deceased husband, and accordingly such sum of Five Thousand Four Hundred and Fifty (5,450.00) Dollars represents income taxable to the Estate of Appellant's deceased husband, and does not represent income taxable to Appellant in 1937.

L. W. WRIXON,
Attorney for Appellant.

[Endorsed]: Filed July 26, 1943. Paul P. O'Brien, Clerk.

No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,
Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,
Appellee.

APPELLANT'S OPENING BRIEF.

L. W. WRIXON,
Merchants Exchange Building, San Francisco,
Attorney for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,
Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,
Appellee.

APPELLANT'S OPENING BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from a judgment of the District Court of the United States for the Northern District of California, Southern Division.

This action in the District Court was for the recovery of Federal Income Taxes erroneously and illegally collected from Appellant (R. 3, 4, 6, 7). Claim for Refund of said Federal Income Taxes was filed by Appellant but said Claim for Refund was rejected by the Commissioner of Internal Revenue (R. 7). This action for the recovery of said taxes was brought in the District Court pursuant to Section 24 (5) of the Judicial Code as amended; United States Code, Title 28,

Section 41 (5). The matter came to trial on February 9, 1943 and the judgment of the District Court was entered in favor of Appellee on May 13, 1943 (R. 25). On June 18, 1943, under authority of Section 128(a) of the Judicial Code, as amended; United States Code, Title 28, Section 225, appeal was taken to this Court to review the judgment of the District Court (R. 66). This appeal and the transcript of record were filed and docketed in this Court on July 26, 1943 (R. 69). The existence of jurisdiction in the District Court is set forth in Paragraph II of Appellant's Complaint (R. 2, 3).

STATEMENT OF THE CASE.

Appellant is the surviving wife of Prentis Cobb Hale, Sr. (R. 4). Prentis Cobb Hale, Sr. died testate on November 21, 1936, and his Will, which was admitted to probate (R. 4), provided among other things that:

> (a) He believed and declared all of his property was his own separate property but that if any of his property should be found to be community property and his wife (Appellant herein) should elect to take any portion thereof under the community property laws of California, then the property thereafter in the Will which was set apart in trust for Appellant during her lifetime should be reduced by the appraised value of the property which Appellant might elect to take as community property (R. 44, 45), and

(b) The sum of $10,000.00 in cash and all automobiles owned by the testator be given to Appellant (R. 45), and

(c) Certain real and personal property be distributed to a trustee to be held in trust for the use and benefit of Appellant (R. 45); the *net income* of the trust fund to be paid to Appellant during the term of her natural life (R. 47), and

(d) Subject to certain contingencies not here material, the residue of the trust property held by the Trustee on the termination of the trust, together with all of the other property of the estate of Prentis Cobb Hale, Sr. which remained for final distribution after the payment of debts and satisfaction of specific bequests was given and bequeathed to Prentis Cobb Hale, Jr., the son of Appellant (R. 48, 49).

Subsequent to the death of her husband, Appellant claimed that a large portion of the property of her husband's estate was community property and that under the laws of the State of California, she was entitled to one-half of such property (Paragraph V of Complaint, R. 5). This claim of Appellant was resisted by Prentis Cobb Hale, Jr. In order to settle the controversy amicably and without resort to litigation, an agreement was executed, dated June 18, 1937 (R. 37, 38, 39). The agreement recites that it is being executed for the purpose of settling, without litigation, the controversy between Appellant and Prentis Cobb Hale, Jr. and that the parties accept the sum of

$340,000.00 as the fair net value of the one-half interest of Appellant in the community property of Prentis Cobb Hale, Sr. (R. 39). Pursuant to Article 1 of this agreement, Appellant received outright and without any trust restrictions certain real and personal property (R. 40, 41) which otherwise by the terms of Article Thirteenth of the Will of Prentis Cobb Hale, Sr. (R. 45, 46) would have been distributed to a certain Trustee to pay the net income therefrom to Appellant during the term of her natural life with remainder over to Prentis Cobb Hale, Jr. (R. 47, 48).

Pursuant to Article 3 of the agreement of June 18, 1937, there was distributed to Prentis Cobb Hale, Jr., outright and without any trust restrictions 6,000 shares of Transamerica Corporation stock (R. 41) which otherwise by the terms of Article Thirteenth of the Will of Prentis Cobb Hale, Sr. would have been distributed to a Trustee to pay the net income to Appellant during the term of her natural life and with remainder over to Prentis Cobb Hale, Jr. (R. 47, 48).

As a consequence of the above described transfers of property to Appellant and Prentis Cobb Hale, Jr. under the agreement of June 18, 1937, there remained for distribution to the Testamentary Trustee out of the property originally intended by the Testator to be held in trust, only the following, to-wit:

(a) 10,000 shares of Hale Bros. Stores and
(b) 50 shares of Hale Real Estate Company.

These two groups of securities were distributed by the Estate of Prentis Cobb Hale, Sr. to the Testamentary Trustee on July 29, 1937 (R. 57).

A summary showing the property bequeathed in Trust by Article Thirteenth of the Will of Prentis Cobb Hale, Sr. and showing also how such property and income therefrom was actually distributed pursuant to the agreement of June 18, 1937 is set forth in tabular form in Exhibit A (Appendix i).

In addition to making provision for a distribution of a portion of the securities which otherwise would have become a part of the Testamentary Trust, the parties to the agreement also agreed upon an allocation of the income which had been received by the Estate of Prentis Cobb Hale, Sr. on the securities during the interval between the date of death of Mr. Prentis Cobb Hale, Sr. on November 21, 1936 and the date of the agreement of June 18, 1937 (R. 42, 43). The agreement of June 18, 1937 in this respect provided in substance that:

(a) All dividends theretofore received by the Estate of Prentis Cobb Hale, Sr. on the shares of stock to be distributed to Appellant under paragraph 1 of the agreement (R. 40) should be paid by the Estate to Appellant (Article 8 of agreement, R. 42); and

(b) All dividends theretofore received by the Estate of Prentis Cobb Hale, Sr. on the 6,000 shares of Transamerica Corporation stock to be distributed to Prentis Cobb Hale, Jr. under paragraph 3 of the agreement (R. 41) should be paid by the Estate to Prentis Cobb Hale, Jr. (Article 9 of agreement, R. 43).

As a consequence of the provisions of Articles 8 and 9 of the agreement of June 18, 1937 (R. 42, 43), there was distributed:

(a) To Appellant, the sum of $5750.00 cash and 40 shares of Bancamerica Blair Co. stock valued at $12.00 per share or $480.00, making a total distribution to Appellant of $6230.00 (R. 36, 61, 62) and

(b) To Prentis Cobb Hale, Jr., dividends on 6,000 shares of Transamerica Corporation stock (R. 43).

The amount of $6230.00 which Appellant received from the Estate of Prentis Cobb Hale, Sr. under the provisions of Article 8 of the agreement of June 18, 1937 was reported by Appellant as taxable income from a Fiduciary in her individual income tax return for the calendar year 1937 and thereafter Appellant paid the amount of Federal Income Tax applicable thereto (Par. IV, Complaint, and Par. VII, Findings, R. 3, 23, 24).

The dividends on 6,000 shares of Transamerica Corporation stock which were distributed to Prentis Cobb Hale, Jr. under Article 9 of the agreement of June 18, 1937 were nevertheless reported in the Federal Income Tax Return of the Estate of Prentis Cobb Hale, Sr. (R. 59).

Appellant filed a claim for refund of the taxes paid by her, applicable to said sum of $6230.00 and on November 12, 1941 the Commissioner of Internal Revenue rejected Appellant's claim (R. 7, 32).

In addition to the sum of $6230.00 received by Appellant as heretofore described, Appellant also received and reported as taxable income in the year 1937, the sum of $5450.00 (R. 50). This sum was received from the Testamentary Trustee under the Trust created by Article Thirteenth of the Will of Prentis Cobb Hale, Sr. as modified by the agreement of June 18, 1937 (Par. VI, Complaint, R. 6, 36). The amount of $5450.00 represented dividends received by the Estate of Prentis Cobb Hale, Sr. during the period from the date of death of Prentis Cobb Hale, Sr. (November 21, 1936) to the date the securities ultimately forming a part of the Testamentary Trust were distributed to the Trustee, namely, July 29, 1937 (R. 36; Article 2 of Agreement June 18, 1937, R. 41). These dividends may be summarized as follows:

(a) On 10,000 shares of Hale Bros. Stores, Inc.	$5000.00
(b) On 50 shares of Hale Real Estate Company	450.00
(c) Total	$5450.00

The claim for refund filed by Appellant and heretofore referred to (R. 7, 32) which was rejected by the Commissioner of Internal Revenue, also included a claim for the refund of Federal Income Taxes applicable to the said sum of $5450.00 reported by Appellant as taxable income.

Upon the facts as hereinbefore stated and which are also set forth in the Findings of Fact (R. 19-24) the

District Court concluded that the amounts of $6230.00 and $5450.00 so distributed by the Estate of Prentis Cobb Hale, Sr. and the Testamentary Trustee respectively to Appellant were properly reported by Appellant as taxable income and judgment was accordingly entered for the defendant on May 13, 1943 (R. 25).

THE QUESTIONS INVOLVED.

The first question involved on this appeal is the legal status of the amount of $6230.00 received by Appellant under Article 8 (R. 42) of the agreement of June 18, 1937, namely, whether such amount in the hands of Appellant represents:

(a) Taxable income to Appellant as held by the District Court, or

(b) Receipt of property to compromise contemplated litigation by Appellant as an heir to her husband's estate or in partial settlement of Appellant's interest as a surviving wife in the community estate of her husband, in either of which cases the proceeds received by Appellant would be exempt from Federal Income Tax under Section 22 (b) (3) of the Revenue Act of 1936 (Appendix p. ii) in the hands of Appellant but would be taxable income to the Estate of Prentis Cobb Hale, Sr.

The second question involved on this appeal is whether the sum of $5450.00 which was received by Appellant from the Trustee of the Testamentary Trust

is properly considered taxable income to Appellant in the year 1937 as held by the District Court or whether it represents the distribution to Appellant of an amount to which Appellant was not entitled under the law of the State of California and which amount therefore should be included in the taxable income of the Estate of Prentis Cobb Hale, Sr. for the year 1937 instead of in the taxable income of Appellant.

SPECIFICATION OF ERRORS.

The following is a list of the errors which Appellant contends were committed by the District Court and upon which errors Appellant relies on this appeal:

(1) The determination of the District Court that the executors of the Will of Prentis Cobb Hale, Sr. and the Testamentary Trustee were, under the terms of the Will, authorized to credit and distribute to Appellant both the items of $6230.00 and $5450.00 heretofore mentioned (Findings, R. 24).

(2) The determination of the District Court that the executors of the Will of Prentis Cobb Hale, Sr. were entitled to deduct from the income tax return of the Estate the amount of $6230.00 and $5450.00 heretofore mentioned and that the Estate of Prentis Cobb Hale, Sr. was not required to pay income taxes upon them (Findings, R. 24).

(3) The determination of the District Court that Appellant was the person properly receiving

such distributions and was accordingly required under Section 162(c) of the Revenue Act of 1936 to return these amounts as her income and to pay the taxes upon same (Findings, R. 24).

(4) The District Court erred as a matter of law in failing to find that the sum of $6230.00 was received by Appellant under the agreement of June 18, 1937 in settlement of contemplated litigation or in partial settlement of Appellant's community interest in the estate of her deceased husband.

(5) The District Court erred as a matter of law in failing to find that under the law of the State of California in effect during the time here involved, the income accruing on the trust property during the period intervening between the date of death and the date of distribution of the property to the Testamentary Trustee belongs to the Estate of the Decedent and not the person entitled to the income of the Testamentary Trust (Appellant herein).

THE STATUTES INVOLVED.

Sections 22 (b) (3) and 162 (c) of the Revenue Act of 1936 are set forth in the Appendix hereto.

SUMMARY OF ARGUMENT.

(1) The amount of $6230.00 which is admitted by all parties to be income to the Estate of Prentis Cobb Hale, Sr. when originally received became merely part and parcel of Appellant's compromise settlement of her interest as an heir of her husband's estate when it was distributed to her in the same manner that dividend income of an estate may be used to pay a creditor's claim or repay a loan without being regarded as taxable income to the recipient.

(2) The amount of $6230.00 represents dividends received by the Estate of Prentis Cobb Hale, Sr. intervening between the date of Mr. Hale's death and the agreement of June 18, 1937. It is taxable to the Estate of Prentis Cobb Hale, Sr. in exactly the same manner as the dividends on the 6,000 shares of Transamerica stock distributed to Prentis Cobb Hale, Jr. were treated (R. 59).

(3) When income is once received by a taxpayer, such as the $6230.00 received by the Estate of Prentis Cobb Hale, Sr. in this case, the incidence of the applicable income tax may not be transferred to another (Appellant herein) merely by an agreement assigning a sum of money corresponding in amount to the income received by the entity originally subject to tax.

(4) If the income of $6230.00 admittedly received by the Estate of Prentis Cobb Hale, Sr. in 1937 and distributed to Appellant in the same year had not been made the subject of an agreement until 1938 this amount of necessity would have been reported as taxable income by the Estate in 1937 and would have been

distributed to Appellant tax free in 1938. Why should the purely fortuitous circumstances of receipt by the Estate and payment to Appellant in the same taxable year result in a tax to Appellant whereas a distribution if postponed to January 2, 1938 would have resulted in the amount being taxed to the Estate of Prentis Cobb Hale, Sr. in 1937?

(5) With respect to the dividends of $5450.00 which were received by the Estate of Prentis Cobb Hale on the trust property subsequent to the death of Mr. Hale and prior to distribution of the trust property to the Trustee, the law of California during the period here in question is that an income beneficiary is not entitled to any income accruing prior to the distribution of the trust property to the Testamentary Trustee because until the trust property is formally distributed to the Testamentary Trustee there is no trust in existence and hence there can be no trust income to distribute.

ARGUMENT.

1. INTRODUCTORY STATEMENT.

It is admitted by Appellant that the two sums here involved, namely, $6230.00 and $5450.00 represent income which is taxable to some taxpayer in the year 1937. The question is whether these amounts are for Federal Income Tax purposes properly taxable to Appellant or to the Estate of Prentis Cobb Hale, Sr. The two amounts were received by Appellant under circumstances which are materialy different and ac-

cordingly this argument will be presented in two parts, the first of which will relate to the sum of $6230.00 and the second, in which the amount of $5450.00 will be discussed.

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2. TERMS OF AGREEMENT OF JUNE 18, 1937 AS COMPARED WITH PROVISIONS OF WILL.

Appellant contends that the amount of $6230.00 was received by her as an integral part of the settlement of her asserted community property interest in the estate of her husband and on the contrary that Appellant did not receive the sum of $6230.00 as income from the estate of her husband. The purpose and intention of the parties in executing the agreement of June 18, 1937 is stated to be:

> "* * * For the purpose of compromising and settling without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr. * * *" (R. 39).

The entire agreement must be regarded as having been executed for that purpose and not merely Article 1 thereof by the terms of which Appellant received certain real and personal property (R. 40). Article 8 is just as much a part of the contract as Article 1 and Article 8 provides that in addition to the property to be distributed to Appellant under Article 1, Appellant shall be entitled to receive:

> "* * * All dividends heretofore declared by the respective corporations, or by any thereof, hereinabove in the said paragraph 1 of this agreement named, * * * heretofore paid to and received by

> the said executrix and the said executors of the said last will and testament * * *'' (R. 42).

In other words, the measure of Appellant's community interest in the estate of her deceased husband was, by the terms of this agreement, determined to be an amount equal in value to the real property and securities referred to in Article 1 of the agreement (R. 40) plus the dividends theretofore received by the estate upon the shares distributed to Appellant under Article 1. This provision of the agreement relating to distributing to Appellant the dividends on the shares listed in Article 1 has the same effect as if, in Article 1, the parties had stated that Appellant should be entitled to receive the properties therein described, together with the sum of $6230.00. Instead of determining accurately at the time of drafting the agreement the amount of dividends which had been theretofore paid to the executors of the estate and using this specific figure as an additional measure of Appellant's community property interest the agreement merely provided that Appellant should be entitled to such dividends in whatever amount they might be. Putting the matter another way, the estate was discharging an asserted liability to Appellant by distributing three types of property, namely, (1) real property, (2) personal property and (3) an indeterminate sum to be measured by the income from some of the property so distributed.

If reference is made to the Will of Prentis Cobb Hale, Sr. to ascertain whether Appellant had any rights with respect to the amount of $6230.00 here in

controversy, it will be seen that there is no provision in the Will directing this amount to be paid to Appellant. The nearest approach to any such provision in the Will is to be found in Article Thirteenth of said Will (R. 45, 47) in which it is provided that Appellant shall be entitled to the *net income* of certain property which is bequeathed to a Testamentary Trust. This property, instead of ultimately forming a part of the Trust, was, as heretofore stated, distributed to Appellant under the agreement of June 18, 1937. If the contention is made that Appellant was already entitled to the $6230.00 by reason of the provisions of Article Thirteenth of the Will, the answer to such contention is that the agreement gave to Appellant not an item of *net* income but instead the *gross* amount of certain dividends without any deduction for any expenses. In other words, the agreement gave to Appellant the right as a creditor to demand and receive certain specific dividends wholly without regard to whether, by reason of any losses, expenses or other causes, there remained any trust net income to distribute. That is to say, by the terms of the agreement of June 18, 1937, Appellant's interest in the estate of her deceased husband was translated from that of an heir entitled to an interest in the *net income* of certain trust securities to that of a creditor entitled to enforce a demand for certain specific items of *gross income* and wholly without regard to whether any trust net income existed or not.

If, as has been intimated by the opinion of the District Court, Appellant was entitled as a matter of

law to receive the sum of $6230.00, then the inclusion of detailed provisions for the payment of this sum to Appellant in Article 8 of the agreement was a wholly unnecessary and idle act. Certainly the parties to the agreement did not share that opinion at the time the agreement was executed. It is equally certain that the parties to the agreement of June 18, 1937 intended that Appellant should receive as a measure of and in settlement of her community interest and in the settlement of her general interest as an heir of the estate of her husband, not only the real and personal property described in Article 1 of the agreement but also the amount of the dividends referred to in Article 8 of the agreement.

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3. **INCONSISTENCY OF TREATMENT OF DIVIDENDS ON SHARES RECEIVED BY APPELLANT AS COMPARED WITH DIVIDENDS ON SHARES RECEIVED BY HER SON.**

It is in evidence that the shares of stock which were to be placed in the Testamentary Trust provided in Article Thirteenth of Mr. Hale's Will were divided into three parts. One portion of the shares was distributed to Appellant under Article 1 of the agreement; another portion (6,000 shares of Transamerica stock) was distributed to Appellant's son under Article 3 of the agreement; and a third portion of the securities ultimately was distributed as a part of the Testamentary Trust (R. 40, 41). It is also in evidence that the income intervening between the date of death and the agreement of June 18, 1937 on all of the securities which were originally intended to form a part of the

Testamentary Trust was likewise distributed in the same manner as the securities, namely, the Appellant received the income on the shares distributed directly to her (R. 42); her son received the income on 6,000 shares of Transamerica stock distributed to him (R. 43) and the dividends on the shares distributed to the Testamentary Trustee were paid to the Trustee and were subsequently distributed to Appellant by Trustee (R. 50).

It is also in evidence that the income which was received by the Estate of Prentis Cobb Hale, Sr. on the 6,000 shares of Transamerica stock distributed to Appellant's son was reported as taxable income by the said estate (R. 59). Appellant contends that the same treatment should be accorded her as was accorded her son, namely, that the income which was originally received by the estate of her husband on the securities distributed to her and to her son should be taxable to said estate as income received during the course of administration. There is no more basis in law for taxing the $6230.00 to Appellant than there would have been for taxing the income on the 6,000 shares of Transamerica stock for the corresponding period to Appellant's son.

If it was proper for the Estate of Prentis Cobb Hale, Sr. to report as taxable income the dividends on 6,000 shares of Transamerica stock distributed to Appellant's son under Article 9 of the agreement of June 18, 1937, then the Estate should also be taxable on similar dividends distributed to Appellant under the same agreement.

4. **INCOME IS NOT ORDINARILY CAPABLE OF ASSIGNMENT SO AS TO DEFEAT THE INCIDENCE OF TAX UPON THE ORIGINAL RECIPIENT OF SUCH INCOME.**

It is in evidence and admitted that the dividends of $6230.00 here in question were originally received by the estate of Prentis Cobb Hale, Sr. It is a fundamental rule in the law of income taxation that income cannot be assigned before it is received and thus defeat the tax on the assignor. See *Lucas v. Earl,* 50 S. Ct. 241, 281 U. S. 111, 74 L. Ed. 731, decided March 17, 1930. In *Lucas v. Earl,* husband and wife domiciled in California agreed that the future earnings of the husband thereafter would be held in joint tenancy. The question was whether Mr. Earl could by this means avoid reporting one-half of the income from his salary or earnings and cause it to be reported by his wife as taxable income. The United States Supreme Court, speaking through Justice Holmes, held that the tax applied to the person who earned the income and that this liability could not be escaped by an anticipatory arrangement involving an assignment of income. See also in this connection *Rosenwald v. Commissioner,* 33 Fed. (2d) 423, Seventh Circuit, decided June 7, 1929. In this case the Court held that the plaintiff could not, by an assignment of income to a charitable organization, be relieved of his liability to pay the tax on such income.

The point which it is desired to make in this connection is that the estate of Prentis Cobb Hale, Sr. cannot, by an assignment of income which has theretofore been received by the estate, transfer to Appellant

the liability for the payment of tax upon such income. The estate, as the original recipient of the income, is required to pay the tax thereon.

If it is urged that an estate, during the course of administration is entitled to deduct income paid or credited under Section 162(c) of the Revenue Act of 1936, the Appellant's answer is that Section 162(c) refers to distribution of income as such. Section 162(c) is set forth in full in the appendix but the portion thereof pertinent to this discussion is quoted herewith for ready reference:

> "* * * There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the *income* of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir or beneficiary * * *" (italics supplied).

The amount of $6230.00 which was admittedly income when received by the Estate of Prentis Cobb Hale, Sr. is not "Income" within the statute when distributed to Appellant either in settlement of her community interest or as a creditor entitled to the same under Article 8 of the agreement of June 18, 1937. For instance, if the $6230.00 were paid to Appellant in reimbursement of advances which she made on behalf of the estate of her deceased husband no one would contend that the $6230.00 so received by Appellant should be reported as taxable income. The fact that the $6230.00 was clearly income to the Estate of Prentis Cobb Hale, Sr. when received has no bearing

whatsoever in determining its status to Appellant for purposes of her income tax return. This point is particularly pertinent here when the agreement under which the amount was received by Appellant is designated clearly and unequivocally as an agreement

> "* * * for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr., and to that end of establishing the fair net value of the said community property at the time of the death of the said Prentis Cobb Hale, Sr. * * *" (R. 39).

Consequently, the assignment of the amount of $6230.00 by the Estate of Prentis Cobb Hale, Sr. to Appellant in settlement of her community rights pursuant to the agreement of June 18, 1937 cannot have the effect of transferring to Appellant the incidence of the Federal Income Tax thereon under the decisions in such cases as *Lucas v. Earl,* 50 S. Ct. 241, 281 U. S. 111, 74 L. Ed. 731, and *Rosenwald v. Commissioner,* 33 Fed. (2d) 423, Seventh Circuit.

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5. APPELLANT RECEIVED THE SUM OF $6230.00 UNDER A DECREE OF RATABLE DISTRIBUTION.

It will be observed that Appellant in this case did not receive the sum of $6230.00 from the Testamentary Trustee created under Article Thirteenth of the Last Will and Testament of Appellant's husband but instead received this sum ($5750.00 in cash and 40 shares of Bancamerica Blair stock valued at $480.00) directly

from the executors of the estate of Prentis Cobb Hale, Sr. (R. 49, 50). This observation is intended to show that Appellant did not receive this money or property by reason of her interest under the Testamentary Trust created by Article Thirteenth of the last will and testament of her husband, but instead, received the said sum of $6230.00 solely as part and parcel of the amount of her claimed community interest. If the sum of $6230.00 represented a distribution of income from the Testamentary Trust to which Appellant was entitled as an heir, Appellant would not have received such sum until the Trust had been formally created by distribution to the Trustees, which event took place on July 29, 1937, just as was done with the sum of $5450.00 received by Appellant (R. 50).

The method of distribution of the sum of $6230.00 to Appellant further supports Appellant's contention that she received said sum in settlement of her rights as a creditor of the estate of her husband under the agreement of June 18, 1937 and not at all by reason of her interest as an heir under Article Thirteenth of the last will and testament of her husband. Reference is again made to the point that $6230.00 represents *gross* dividend income whereas Article Thirteenth of said will provides that Appellant would have been entitled to receive only *net* income (R. 47). It is unnecessary to point out the many different circumstances which could transpire to result in the absence of net income, even though the trust received a certain amount of gross income.

6. THE DECISION IN LYETH v. HOEY, 59 S. Ct. 155, 305 U. S. 188, 83 L. Ed. 119, DECIDED DECEMBER 5, 1938.

In the case *Lyeth v. Hoey,* a decedent died in 1931, a resident of Massachusetts and left as her heirs four living children and the Appellant and his brother who were the sons of a deceased child. The decedent gave certain small legacies to her heirs and the entire residue amounting to more than $3,000,000.00 was bequeathed to certain trustees under an endowment trust. The Appellant objected to the will of the Decedent upon the grounds of lack of testamentary capacity and undue influence. The Probate Court before which the will was being offered granted a motion for the framing of issues for a trial before a jury as to the question of whether the decedent had testamentary capacity. Thereafter, a compromise agreement was entered into between the heirs, the legatees and devisees under the will pursuant to which the Appellant received a substantial amount of property. The Commissioner of Internal Revenue attempted to tax the amount received by Appellant as taxable income. The Appellant contended that the amount received by him was exempt under Section 22(b)(3) of the Revenue Act of 1932 which exempted from income tax:

> "The value of property acquired by gift, bequest, devise or inheritance * * *"

There has been no change in the statute since the decision in *Lyeth v. Hoey* insofar as it relates to property received by gift, bequest, devise or inheritance. That is, Section 22(b)(3) of the Revenue Act of 1932

under which the case of *Lyeth v. Hoey* was decided, reads exactly the same as Section 22(b)(3) under which our present case arises.

In *Lyeth v. Hoey,* the United States Supreme Court held that property received by an heir under an agreement which had for its purpose the compromising of impending litigation with respect to a decedent's will constituted property received by inheritance under Section 22(b)(3) of the Revenue Act of 1932 and did not constitute taxable income. The opinion of the United States Supreme Court reads in part as follows (305 U. S. at page 196):

> "* * * There is no question that petitioner obtained that portion, upon the value of which he is sought to be taxed, because of his standing as an heir and of his claim in that capacity. It does not seem to be questioned that if the contest had been fought to a finish and petitioner had succeeded, the property which he would have received would have been exempt under the federal act. Nor is it questioned that if in any appropriate proceeding, instituted by him as heir, he had recovered judgment for a part of the estate, that part would have been acquired by inheritance within the meaning of the act. We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption * * *"

As has been pointed out heretofore, the statutory provisions involved in our present case are identical

with the statute as it existed in the case of *Lyeth v. Hoey*. Turning to a comparison between the facts of the two cases, we find:

(1) In the cited case the Taxpayer Appellant was an heir of the Decedent and it is likewise in our present controversy.

(2) There, as here, the Taxpayer Appellant contested the disposition of property made by Decedent's will.

(3) There, as here, a compromise agreement was entered into in order to avoid litigation.

(4) There, as here, the Taxpayer Appellant received certain property admittedly in compromise of the asserted claims.

(5) In each case the Treasury Department asserted a right to tax the property received as income instead of exempting it as property received by inheritance.

It is admitted in the pleadings that Appellant received the sum of $6230.00 under the terms of Article 8 of the agreement of June 18, 1937 (Complaint, paragraphs IV and V (R. 3-5), and Answer, paragraphs II and III thereof (R. 8, 9)). Appellant therefore contends that both the facts and the law involved in *Lyeth v. Hoey* are directly applicable to Appellant's case and that the decision here should be correspondingly in Appellant's favor insofar as her case refers to the sum of $6230.00.

It is also observed in this connection that it has never been contended that the securities and real estate received by Appellant under the agreement of June 18,

1937 were subject to income tax in her hands. The sum of $6230.00 is in exactly the same category since it is merely a part of the settlement price formally agreed upon as a measure of the value of the community property interest in Decedent's estate to which Appellant was entitled.

It is also Appellant's belief that a considerable part of the difficulty in this case arises from the failure to distinguish between the intention of the parties with respect to the payment of said sum of $6230.00 and the use of the word "dividends" in Article 8 of the agreement of June 18, 1937 (R. 42). Dividends ordinarily connote income. It is clear, however, that dividends once received by a taxable entity such as the estate of Prentis Cobb Hale, Sr. lose their identity as income when distributed by the original taxable entity in liquidation of a contractual obligation. Appellant does not contend that the sum of $6230.00 should escape taxation; Appellant does contend that $6230.00 should be taxed to the estate by which it was received.

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7. DISTRIBUTION OF $6230.00 TO APPELLANT MADE IN YEAR OF ITS RECEIPT BY ESTATE OF PRENTIS COBB HALE, SR.

Dividends amounting to $6230.00 were received by the Estate of Prentis Cobb Hale, Sr. in 1937 (R. 36) and the amount of $6230.00 was paid to Appellant in the year 1937 (R. 50, 61, 62). The purely fortuitous circumstance of distributing the $6230.00 to Appellant in the year of its receipt by the Estate of Prentis Cobb Hale, Sr. provides a seeming plausibility to the con-

tention that the said $6230.00 should be regarded as taxable income of the Appellant for the year of its receipt by Appellant, namely, the year 1937. However, further analysis will show that the apparent propriety of regarding the amount of $6230.00 as taxable to Appellant in 1937 arises solely out of the coincidence of the receipt and distribution of such amount within one taxable year.

In illustration of Appellant's point in this connection, let us assume that instead of settling Appellant's claim amicably by the agreement of June 18, 1937, Appellant had been required to litigate the issue. Assume further that the litigation was commenced in 1937 and concluded by a final decision in 1942 under which decision, let us assume further, that Appellant received exactly the same property, including the $6230.00 that was distributed to her under the agreement of June 18, 1937. Could any one successfully contend that the Federal income tax applicable to the sum of $6230.00 should be deferred until the calendar year 1942, when, in point of fact, the income was actually received by the estate in the year 1937? It is fundamental that the Federal income tax law requires returns of income to be made on an annual basis and requires that the tax be paid on a similar basis. If the matter here at issue had proceeded to litigation, there is no question concerning the fact that the estate of Decedent would have reported the dividend income of $6230.00 in the year of its receipt and would have paid the Federal income tax applicable thereto in the usual manner. It is also clear that if

the Appellant had secured a judgment in 1942 in the manner previously assumed, the estate would have disbursed the $6230.00 together with the other property in liquidation of its liability to Appellant in the same manner that any other money or property of the estate would be paid to a creditor in settlement of a claim.

Further, it is pointed out in this connection that no distinction can be drawn between the principle under which Appellant received property pursuant to a property settlement agreement as compared with a receipt of property as a result of litigating her rights under the will because the United States Supreme Court said in *Lyeth v. Hoey,* 59 S. Ct. 155, 305 U. S. 188, 83 L. Ed. 119 (305 U. S. at page 196):

> "* * * We think that the distinction sought to be made between acquisition through such a judgment and acquisition by a compromise agreement in lieu of such a judgment is too formal to be sound, as it disregards the substance of the statutory exemption * * *"

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8. ARTICLE FOURTH OF WILL OF PRENTIS COBB HALE, SR.

Heretofore in this brief, Appellant has proceeded upon the theory that the sole basis for her claim to the sum of $6230.00 was the compromise agreement of June 18, 1937. Appellant submits that while it is true she received the said sum under and pursuant to the compromise agreement, basically and fundamentally, it can also be argued that the amount of

$6230.00 was received by her as an heir under Article Fourth of her husband's Will and that the agreement which provided for distribution of this amount was executed merely for the purpose of carrying out the provisions of Article Fourth of the Will. Article Fourth reads as follows:

> "I believe and declare that all property which I own, or in which I have any interest, is my own separate property, but if any property in which I may be interested at the time of my death shall be found to be community property, and if my said wife shall elect to take any portion thereof under the community property laws of this State, then I direct that the property and estate hereinafter set apart in trust for her use during her lifetime be reduced in amount by the appraised value of the community property and estate which she shall elect to take." (R. 44, 45.)

Under Article Fourth of her husband's Will, Appellant had the right to prove the amount of community property to which she was entitled and by the specific terms of the Will, Appellant was entitled to receive such amount of community property out of the assets otherwise bequeathed to the Testamentary Trust. Appellant therefore contends that even if the argument heretofore advanced by Appellant to the effect that she took the $6230.00 as a creditor is not conceded, certainly the provisions of the Will are specific to the effect that Appellant was entitled to receive as an heir such portion of her husband's property as could be proved to be community in character. Appellant's position may therefore be described as

that of an heir establishing the amount of her community property under the specific provisions of her husband's Will and then immediately upon the determination of the amount thereof her position was transformed into the status of a creditor by reason of a specific agreement on the part of the estate to assign and deliver specified parcels of real and personal property.

To summarize then, Appellant contends that whether we view the agreement of June 18, 1937 as a compromise of her rights as an heir to contest the Will of Prentis Cobb Hale, Sr. or whether we view the receipt by Appellant of the property here involved as being under the provisions of Article Fourth of the Will with the agreement merely ancillary or for the purpose of defining Appellant's particular rights, the conclusion is the same, namely, that Appellant received the sum of $6230.00 together with other property not as income but as settling Appellant's rights as an heir.

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9. THE OPINION FILED IN THE DISTRICT COURT.

Speaking with respect to the $6230.00 received by Appellant from the Estate of her husband, the opinion states in part (R. 16):

> "* * * The income derived from property held in trust relates back to the date of testator's death. Its status is fixed at that time, and the beneficiary is entitled to income derived from the specific property placed in trust * * *. A specific bequest

carries with it all accessions by way of dividends or interest that may accrue after the death of the testator * * *."

It is thus clear that the Court was of the opinion that as a matter of law and independently of the agreement of June 18, 1937, Appellant was entitled to receive the $6230.00 and that she received the same as income. Appellant contends that the following listed California authorities clearly establish the law of this State to be to the contrary as of the date of the distributions here involved:

Clayes v. Nutter, 49 Cal. App. 148, 192 Pac. 870 (Decided August 30, 1920);

Estate of Brown, 143 Cal. 450, 77 Pac. 160 (Decided June 3, 1904).

In the case of *Clayes v. Nutter,* the will gave all of the estate to certain persons as trustees with authority to invest and manage the same and to pay out of the profits thereof the sum of $50.00 per month to a sister of the testatrix during her natural life. The Court held that the direction to pay the income to the sister of the testatrix in the absence of an express provision in the will making such a bequest of income payable from date of death did not entitle the life beneficiary to receive any payments during the time the estate was in the course of administration or prior to the date it was distributed to the trustees. This case is a clear authority for the proposition that income from a testamentary trust under the laws of the State of California does not accrue to the life

tenant in the interval from the date of death to the date the trust property is distributed to the trustees.

In the case of the *Estate of Brown,* the will bequeathed a fund of $5000.00 to trustees to be invested and out of the income arising therefrom to pay monthly to the sisters of the testatrix the sum of $20.00 during the natural life of the life tenant. The question arose as to whether this income was payable from the date of death or from the date the property was distributed to the trustees. The Court held directly that the income did not become payable to the life tenant until the trust property was distributed to the trustees, and stated (77 Pac. at page 162):

> "* * * The testatrix bequeathed the sum of $5000.00 to certain trustees, and the monthly income was to be paid by the trustees, and not by the executors. Necessarily, the trustees could not begin payment until they received the fund and invested it so as to produce an income. The intention of the testatrix must therefore have been that payments were not to begin until the fund from which it was to be produced was distributed to the trustees who were to make the payments. The distinction is thus stated: 'Where he absolutely gives the beneficiary a given income, and merely indicates in his will the source from which it is to be obtained, the general rule is that the income in such cases is to be estimated from the death of the testator * * *. But where the bequest is only of the income to be obtained from a certain specified fund, * * * it is held that the beneficiary can receive only the actual income when received from such fund' * * *."

The two decisions above referred to establish the rule to be that in California the income from a testamentary trust does not accrue to the life tenant until the trust property is distributed to the testamentary trustee. Of course, an exception exists in the event the trust can be established to be a trust for support and maintenance. In Appellant's case, however, no such situation existed because it is in evidence that appellant was currently receiving $1500.00 per month by way of a family allowance from the estate of her husband (R. 44) and also that her net income as shown by her individual Federal income tax return for the calendar year 1937 was $57,016.73 (R. 64). The authorities cited in the opinion of the District Court (R. 16) in support of its judgment that the life tenant is entitled to the income from a testamentary trust from the date of death of the decedent do not apply under the law of the State of California as it existed at the time here involved.

The following cases are cited in the opinion of the Court in support of its conclusion that the income from the property bequeathed in trust related back to the date of the testator's death and that the income beneficiary (Appellant herein) was entitled to the income accruing thereon after the death of the testator:

McCaughn v. Girard Trust Co., 19 F. (2d) 218;
Estate of White, 41 Bd. of Tax App. 525;
Estate of Fox, 31 Bd. of Tax App. 1181;
Estate of Daly, 202 Cal. 284, 260 Pac. 296.

The case of *McCaughn v. Girard Trust Co.,* 19 F. (2d) 218, related to a case in which the testamentary trust was held by the state Court (Maine) to be invalid and that as a consequence the income received from the date of death was taxable to the heirs entitled to the residuary estate. It is not apparent how the decision in this case supports the Court's conclusions with respect to the rule as to the right of an income beneficiary to trust income under the California rule adopted in the cases of *Clayes v. Nutter* and *Estate of Brown* heretofore cited.

The *Estate of White,* 41 Bd. of Tax App. 525 concerned a trust for the "Education and maintenance of my grandson". It is admitted by Appellant that in this type of trust the income accrues to the life tenant from the date of death but it is observed that this is not the type of trust involved in our present case. As has heretofore been shown our trust is not a trust for maintenance because Appellant had a substantial income from other sources (R. 63, 64).

Estate of Fox, 31 Bd. of Tax App. 1181, referred to an instance of the distribution of capital gains arising after the date of death. This type of profit was made the subject of a special agreement between the parties and, accordingly, the decision does not relate to the question as to who is entitled as a matter of law to the income from a testamentary trust during the interval between the date of death and the date of the creation of the testamentary trust.

In the *Estate of Daly,* 202 Cal. 284, 260 Pac. 296, the California Court held that a surviving wife to

whom had been bequeathed outright certain shares of stock, was entitled to the dividends thereon which accrued in the interval between the date of death and the date of the creation of a testamentary trust in which the wife apparently had no interest. In other words, this case is not concerned with the income accruing to a life tenant during the interval between the date of death and the date of the creation of the trust but instead is concerned solely with a determination of the question as to whether a person to whom specific securities have been devised outright and free of trust is entitled to the income therefrom from the date of death. Appellant submits that the decision in the cited case is not pertinent to a decision in the present case involving the income from property bequeathed in trust.

The opinion of the District Court dismisses the authorities submitted by Appellant (*Clayes v. Nutter,* 49 Cal. App. 148, 192 Pac. 870 and *Estate of Brown,* 143 Cal. 450, 77 Pac. 160) with the comment that

> "* * * The cases cited are not in point and Plaintiff's position is untenable * * *" (R. 18).

Appellant very respectfully suggests that the above mentioned cases cited by her are directly in point and directly bear on the question as to who under California law at the time here involved was entitled to receive the income from property bequeathed in trust during the interval between the date of death and the date said property is distributed to the testamentary trustee.

10. THE AMOUNT OF $5450.00 RECEIVED BY APPELLANT FROM TESTAMENTARY TRUSTEE.

As heretofore stated, the amount of $5450.00 represents dividends received by the estate of Prentis Cobb Hale, Sr. prior to the distribution to the Testamentary Trustee of certain securities specified in the Trust created by Prentis Cobb Hale, Sr. It is Appellant's position with respect to these dividends that under the decisions of the Supreme and Appellate Courts of this state heretofore in this brief referred to, namely, *Clayes v. Nutter,* 49 Cal. App. 148, 192 Pac. 870, and *Estate of Brown,* 143 Cal. 450, 77 Pac. 160, these dividends cannot be regarded as income of such Testamentary Trust because until the Trust comes into existence, it can receive or obtain no income (ante, this Brief, pages 30 to 32). That is, the securities from which these dividends were received were distributed to the Trustee by the Probate Court on or about July 29, 1937 (R. 57). The dividends amounting to $5450.00 had been received by the executors prior to July 29, 1937 and constituted income of the estate, not the Testamentary Trust. Accordingly, until the Court by a decree of distribution on July 29, 1937 created the Testamentary Trust, no Trust existed and consequently, it cannot be said that Appellant, who subsequently received these dividends, received them as a distributee of the Testamentary Trust.

In short, Appellant cannot be said to have received income from a Trust which had no legal existence at the time said dividends were received by the execu-

tors. If Appellant was not entitled, as a matter of law, to receive the dividends of $5450.00 from the Testamentary Trustee, the fact that she did receive such sum does not render it taxable to her as income under the decision in *Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634. In the last cited case the trustee under a testamentary trust made no deduction for depreciation in determining the net income distributable to the beneficiaries and accordingly distributed a greater amount of net income than would have been distributed if depreciation had been deducted. The California Probate Court held that such distribution was erroneous to the extent that depreciation was not deducted and the question was whether the trust income beneficiaries were taxable on the total amount distributed to them or only on the amount which should have been distributed. The United States Supreme Court held that the fact that the beneficiaries actually received and retained a greater amount of money than that to which they were entitled did not render them taxable on such amount. The Court said in the course of its opinion (291 U. S. 35 at page 42):

> "* * * the test of taxability to the beneficiary is not receipt of income, but the present right to receive it. Clearly an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, not on the amount paid, but on that payable * * *"

In other words, the mere fact of receipt by Appellant of the $5450.00 does not render it taxable to her. In addition to being received by her, it must have

been distributed to Appellant as income to which Appellant was legally entitled. Since the California authorities heretofore cited (ante this Brief, pages 30 to 32) establish the rule in California as of the time herein involved to be that the life tenant under a Testamentary Trust is not entitled as a matter of law to the income on the trust property intervening between the date of death and the creation of the trust it follows that under the decision of the U. S. Supreme Court in *Freuler v. Helvering,* 291 U. S. 35, the amount of $5450.00 is not taxable income to Appellant even though received by her.

---

11. SUMMARY.

Appellant's position with respect to the amounts here involved may be summarized as follows:

(1) As to dividends amounting to Six Thousand Two Hundred Thirty ($6230.00) Dollars, this sum represents an integral part of the total settlement received by Appellant in lieu of her claimed community interest and no distinction can be drawn between the principal portion of the settlement relating to real estate and securities and the accumulated dividends thereon under the principle established in *Lyeth v. Hoey,* 59 S. Ct. 155, 305 U. S. 188, 83 L. Ed. 119; and

(2) Although an amount of Five Thousand Four Hundred Fifty ($5450.00) Dollars was received by Appellant, it cannot constitute a taxable distribution of income from a testamentary trust because under

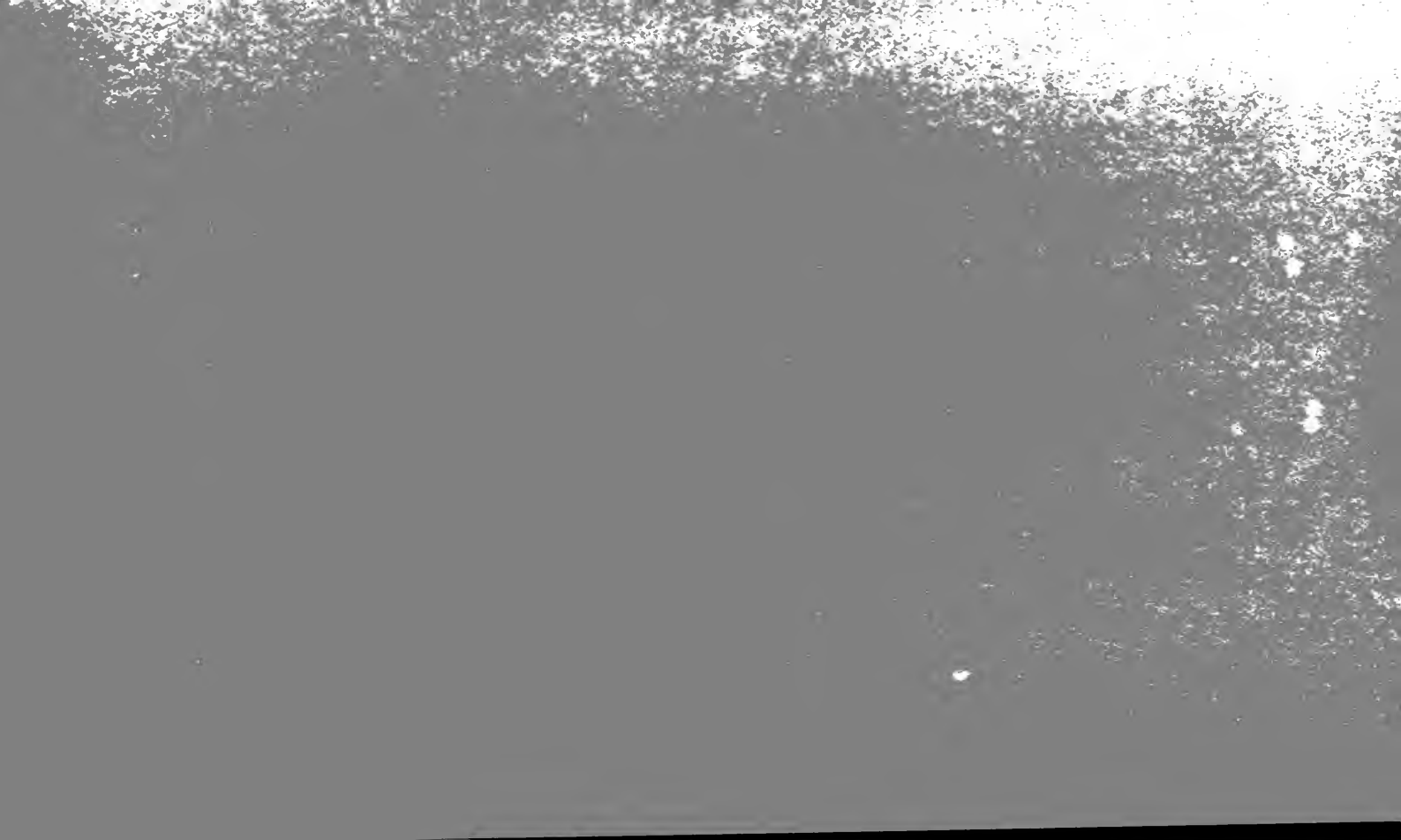
the decisions of the Supreme and Appellate Courts of this state, an income beneficiary of a testamentary trust is not entitled to any income intervening between the date of death and the date of the creation of the testamentary trust, and, accordingly, Appellant cannot be held to have received income from a trust which had no existence at the time the dividends were paid.

Dated, San Francisco,
September 24, 1943.

Respectfully submitted,
L. W. WRIXON,
Attorney for Appellant.

(Appendix Follows.)

Appendix.



Appendix

Exhibit A

Statement Showing Disposition of Property Originally Bequeathed in Trust by Will of Prentis Cobb Hale, Sr.

	Bequeathed to Trust per Article XIII of Will (R. 45, 46)	Distribution per Agreement June 18, 1937		
		To Appellant Per Article 1 (R. 40)	To Prentis Cobb Hale, Jr. per Art. 3 (R. 41)	To Testamentary Trust per Art. 2 (R. 41)
rpus				
me & Bldg. at 2430 nd 2446 Vallejo St., an Francisco	1.00(a)	1.00		
odside Real Property	1.00(a)	1.00		
sta Springs Real roperty	1.00(a)	1.00		
e Bros. Stores, Inc.	18,000 sh.	8,000 sh.		10,000 sh.
nsamerica Corp.	8,000 sh.	2,000 sh.	6,000 sh.	
e Real Estate Company	200 sh.	150 sh.		50 sh.
st National Bank of an Jose–200 shs. These ares were disposed of y Testator prior to eath				
me				
idends on Securities	14,320.00	6,230.00(b)	2,640.00(c)	5,450.00(d)

) Nominal values used merely to illustrate person to whom property is distributed under agreement of June 18, 1937 (R. 40)

) Distributed per Article 8 of Agreement dated June 18, 1937 (R. 42, 43)

) Distributed per Article 9 of Agreement dated June 18, 1937 (R. 43, 44)

) Distributed by Testamentary Trustee to Appellant, but not pursuant to Agreement dated June 18,

Sec. 22 (b) (3) of the Revenue Act of 1936 reads as follows:

> "The following items shall not be included in gross income and shall be exempt from taxation under this title:
>
> "(3) The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);"

Sec. 162 (c) of the Revenue Act of 1936 reads as follows:

> "(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is property paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,

Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,

Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

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Subject Index

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Miscellaneous

No. 10,505

IN THE

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Appellee.

On Appeal from the District Court of the United States for the Northern District of California.

BRIEF FOR APPELLEE.

OPINION BELOW.

The opinion of the District Court (R. 10-18) is reported in 49 F. Supp. 837.

JURISDICTION.

This appeal involves income taxes for the calendar year 1937 in the amount of $3757.93. The taxpayer, plaintiff below, who was at all times mentioned herein a resident of the City and County of San Francisco, State and Northern District of California, on March

14, 1938, filed with the defendant Collector her income tax return for the year 1937, and during the year 1938, paid all of the tax shown to be due in that return. On or about March 8, 1941, taxpayer filed a claim for refund with defendant in the sum of $3757.93. On November 21, 1941, the Commissioner rejected the claim for refund. (R. 20.)

On October 22, 1942, taxpayer instituted a suit in the District Court for the Northern District of California, for recovery of taxes paid under the provisions of Section 24, Fifth, of the Judicial Code, as amended. (R. 2-8.) The judgment of the District Court, denying taxpayer's claim in full, was entered on May 13, 1943. (R. 25.)

Notice of appeal to this Court was filed on June 18, 1943. (R. 66.) Jurisdiction is conferred on the Court by Section 128(a) of the Judicial Code, as amended.

QUESTIONS PRESENTED.

1. Taxpayer received the amount of $6230 as dividends earned on certain stock after the date of her husband's death. That stock, as well as other property, was received by taxpayer in satisfaction of her asserted community property interest in her husband's estate as that interest existed at the date of his death. The issue here is whether the $6230 income was likewise received in satisfaction of taxpayer's community property interest and is thus excludable from taxpayer's gross income under Section 22(b)(3) of the

Revenue Act of 1936, as property acquired by bequest, devise or inheritance, or whether that income was distributed to taxpayer as income earned during the course of administration and "properly paid" to her so as to be includable in her income under Section 162(c) of the Revenue Act of 1936.

2. Taxpayer received during the taxable year the sum of $5450 as dividends earned on certain stock after the date of her husband's death. That stock has been left in a testamentary trust by taxpayer's husband, the income to be paid to her for life. The issue here is whether taxpayer was legally entitled to receive the $5450 so as to constitute that amount income "properly paid" to her within the meaning of Section 162(c) of the Revenue Act of 1936, and thereby includable in her taxable income.

STATUTE INVOLVED.

Revenue Act of 1936, c. 690, 49 Stat. 1648:

Sec. 22. GROSS INCOME.

* * * * * * *

(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this title:

* * * * * * *

(3) *Gifts, bequests, and devises.*—The value of property acquired by gift, bequest, devise, or inheritance (but the income from such property shall be included in gross income);

* * * * * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT.

The pertinent facts as found by the District Court and as appear in the record are as follows (R. 21-24):

The items of income which taxpayer included in her income tax return for the year 1937, and which she claims ought not to have been included in that return, were dividends amounting to $6230 and $5450, which were paid on stocks owned by her deceased husband at the date of his death, and which accrued and were paid after his death, under the circumstances hereinafter set forth. (R. 21.)

Taxpayer is the widow of Prentis Cobb Hale, Senior, who died November 18, 1936, leaving an estate

subject to federal estate taxes of the approximate value of $2,000,000. In addition to legacies not involved herein, he made his son the residuary legatee and left his wife the income from a trust established by clause 13 of his will. In clause 13, he bequeathed to the Bank of America, as trustee, certain houses and furnishings in San Francisco and certain parcels of real property situated in other parts of California, and, in addition, 18,000 shares of capital stock of Hale Brothers Stores, Inc., 200 shares of capital stock of Hale Real Estate Company, and 8000 shares of capital stock of Transamerica Corporation. The trustee was to hold the trust fund for the benefit of the taxpayer and to pay the income therefrom during her life and on her death the trust fund was to be distributed to her son, Prentis Cobb Hale, Jr., who was also the residuary legatee of the estate. All of such property was included in the estate tax return of the estate for estate tax purposes. (R. 21-22.)

Taxpayer was dissatisfied with the terms of the will and asserted that a portion of the property of the estate devised by her husband was property in which she had a community interest under the laws of the State of California. A controversy about the matter between the taxpayer and her son resulted in a compromise agreement between them by which it was agreed that taxpayer had a community interest in property of her deceased husband amounting to more than $680,000 and that the fair market value of one-half thereof to which taxpayer was entitled exceeded $340,000. The decedent's will directed that in the

event that taxpayer asserted a claim to a community interest in his property, the value of her community interest should be taken from the property bequeathed by clause 13 of his will. (R. 22.)

As a result of the compromise agreement and the provisions in the will, there was distributed to the taxpayer all of the real property and furnishings referred to in clause 13, and 8000 shares of Hale Brothers Stores, Inc., 2000 shares of Transamerica Corporation and 150 shares of Hale Real Estate Company, and there was distributed to the residue of the estate 6000 shares of Transamerica Corporation. As a result of this agreement the testamentary trust created in clause 13 received in trust only 10,000 shares of Hale Brothers Stores, Inc. and 50 shares of Hale Real Estate Company. A decree of distribution was entered on July 14, 1937, distributing to the taxpayer the above described properties, and a decree of distribution was entered on July 29, 1937, distributing to the trustee the trust properties. (R. 22-23.)

Previous to the distribution made on July 14, 1937, dividends amounting to $6230 accrued between the death of the decedent and July 14, 1937, upon the stocks distributed to taxpayer. These dividends were paid from time to time to the executors of the estate by the issuing corporations and the executors credited them to the trust up to July 14, 1937. Thereafter the executors distributed these dividends to the plaintiff pursuant to a decree of ratable distribution dated December 22, 1937, and pursuant to the compromise agreement referred to above. (R. 23, 49-51.)

Previous to the distribution to the trustee on July 29, 1937, dividends accrued upon those shares of stocks which were distributed to the testamentary trust in the amount of $5450. These dividends accrued between the date of death and July 29, 1937, when the Bank of America became the distributee of the shares of stock as trustee under the decree of distribution of that date. The executors had received these dividends from time to time and had credited them to the trust. Pursuant to the decree of ratable distribution entered on December 22, 1937, these dividends were distributed to the trustee. They were thereafter paid to the taxpayer who, by the terms of clause 13 of the will, was entitled to receive all income from the trust property and estate during her lifetime. (R. 23, 47, 49-51.)

The executors in their income tax return for the estate reported all of the above mentioned dividends, but deducted them under Section 162(c) of the Revenue Act of 1936, as having been properly distributed to the beneficiary entitled to receive them. The taxpayer included all of these dividends in her tax return and paid the taxes on them. These are the taxes which she now seeks to recover, and which recovery the District Court denied. (R. 23-24.)

SUMMARY OF ARGUMENT.

I.

The income item of $6230 was received by taxpayer from her husband's estate as income. It represented no part of the property received by her in satisfaction

of her asserted community property interest in her husband's estate as that interest existed at the date of his death. The compromise agreement specifically enumerates particular items of real and personal property as being received by taxpayer in satisfaction of her community property interest. The $6230 income is not included in that property. Taxpayer received that income under an entirely separate provision of the compromise agreement, and, presumably only because it represented income subsequently earned on property in which she possessed an interest at the date of her husband's death.

Moreover, the California court decree, which distributed to taxpayer the property received by her in satisfaction of her community property interest, referred only to the specific items of real and personal property listed in the compromise agreement. The income of $6230 was distributed as income to taxpayer by a later separate court decree which in no way purported to distribute that amount in satisfaction of taxpayer's community property interest in her husband's estate.

Since the item of $6230 represents income earned by the estate during the course of administration, and "properly paid" as such to taxpayer during the taxable year, it was correctly included in her taxable income.

II.

Taxpayer was legally entitled to the income item of $5450, which represents income earned on securities

subsequent to her husband's death and prior to the time those securities were distributed under court order to the trustee. As income beneficiary of the trust, taxpayer was entitled to all income earned subsequent to her husband's death, for the California law applies that rule to widow beneficiaries as well as beneficiaries of trusts for support and maintenance. The trust created in taxpayer's favor in the instant case falls within both classifications.

Since the $5450 was "properly paid" to taxpayer during the taxable year under any view of her husband's will, it was correctly deducted from the income of the estate and included in taxpayer's taxable income.

ARGUMENT.

I.

THE INCOME ITEM OF $6230 WAS RECEIVED BY TAXPAYER FROM HER HUSBAND'S ESTATE AS INCOME AND WAS THUS PROPERLY INCLUDED IN HER TAXABLE INCOME UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.

The first item of income here involved is the sum of $6230 representing dividends received by taxpayer on various shares of stock, which shares she received under the compromise agreement entered into with her son in satisfaction of her asserted community property interest in the property left by her decedent husband. Taxpayer contends that the sum of $6230 has the same status as the $338,672 worth of property which she acquired under the compromise agreement, i.e., that both items were received in satisfaction of

her claimed community property interest in the estate of her husband, and that both items, therefore, are, under the doctrine of *Lyeth v. Hoey,* 305 U. S. 188, excludable from gross income under Section 22(b)(3) of the Revenue Act of 1936, *supra,* as property acquired by bequest, devise, or inheritance. The Government concedes that the $338,672 worth of property received by taxpayer under the compromise agreement is exempt from income as property so acquired; and no effort has been made by the Commissioner to include that item in taxpayer's taxable income. The $6230 income earned on that property, however, the Government contends is properly taxable to taxpayer as income received by the estate of taxpayer's husband during the period of administration, and "properly paid" to taxpayer within the meaning of Section 162(c) of the Revenue Act of 1936, *supra.*

Taxpayer's entire argument is bottomed upon the premise that, as a result of the compromise agreement, both the $338,672 real and personal property, and also the $6230 income earned by that property during the course of administration, were received by her in satisfaction of her asserted community property interest in her husband's estate. We think that consideration of the pertinent facts here involved will demonstrate the fallacy of taxpayer's position.

An examination of the compromise agreement entered into by taxpayer on June 18, 1937, reveals the following: It is first provided that both parties thereto determined and accepted (R. 39-40) "the * * * sum of $340,000 as the fair net value * * * of

the * * * one-half interest in the * * * community property at the time of the death of * * * [decedent] to which the * * * [taxpayer was] entitled under the laws of * * * California, as the surviving wife'' of the decedent. As a result of that determination the agreement goes on to provide that there should be released and distributed by a decree of partial distribution to the taxpayer three specifically enumerated items of real property together with certain shares of stock of four corporations, having a total value of $338,672 *''in satisfaction of the said one-half interest in the said community property to which the said Linda Hoag Hale is entitled as aforesaid''*. (Italics supplied.) (R. 40-41.) It is to be observed that in determining what property taxpayer was entitled to in satisfaction of her asserted community property claim, there was included only the specific items of real and personal property above mentioned, and it was expressly provided that that particular property was received in satisfaction of taxpayer's one-half interest in the community property of decedent. The $6230 income earned by those properties during the course of administration was not included in determining the value of the property taxpayer received in satisfaction of the asserted one-half interest in the community property at the time of the death of her husband to which the taxpayer was entitled. It was an entirely separate provision[1] of the compromise

[1]The provision releasing $338,672 worth of property to taxpayer in satisfaction of her community property interest is found in paragraph one of the compromise agreement. The $6230 income item here involved was allotted to taxpayer in paragraph eight. (R. 40-42.)

agreement, in no way designated as being in satisfaction of taxpayer's community property claim, which set forth that taxpayer was to receive dividends earned since the date of her husband's death on these shares of stock which had been previously alloted to her in satisfaction of her asserted community property claim. We think it clear, therefore, that by the express terms of the compromise agreement, taxpayer received in settlement of her community property interest only the $338,672 property expressly designated as being so received. The $6230 income earned on that property subsequent to decedent's death was allotted to taxpayer, not because it represented part of the value of her claimed community property interest as that interest existed upon the date of her husband's death but presumably because it represented income earned on that property interest subsequent to her husband's death, and to which she was therefore entitled. See *Estate of Daly,* 202 Cal. 284.

That taxpayer received only the specific real and personal property valued in the compromise agreement at $338,672, and not any of the income earned thereon, in complete satisfaction of her asserted community property interest is made even more clear by the fact that the decree of distribution handed down on July 14, 1937, by the Superior Court of California distributed to taxpayer, in accordance with the terms of the compromise agreement, only "the items of property, real and personal hereinafter particularly described, * * * in satisfaction of the * * * [taxpayer's] one-half interest in the * * * community property". (R. 52.) The property described by the

court as being distributed in satisfaction of taxpayer's community property interest consisted solely of the seven items of property set forth in the compromise agreement as being valued at $338,672. (R. 40, 53-54.) It is apparent, therefore, that the court was of the opinion that only such property, and no other, was being received by taxpayer in settlement of the community property interest which she possessed in her husband's estate at the date of his death. Nowhere in the court's decree is any mention made of the $6230 income received by the estate subsequent to decedent's death. On the contrary, that income, as such, was distributed to taxpayer, under the authority of an entirely separate court decree dated December 22, 1937, which decree purported simply to distribute the income on that property which had been previously distributed to taxpayer in satisfaction of her asserted community property interest in her husband's estate at the time of his death. That later decree of December 22, 1937, in no way purported to distribute the $6230 income as part of her asserted community property interest in her husband's estate. If, as the taxpayer contends, the income earned after the date of her husband's death is to be deemed part of the property distributed to her in settlement of her community property interest, we can see no reason for the court handing down a separate decree at a later date, setting aside to taxpayer, the income received on specific properties previously distributed to her in satisfaction of her community property interest in her husband's estate. Quite clearly the California court regarded the $6230 income item as no part of the

particular property which taxpayer had previously received in satisfaction of her community property interest, but rather regarded that sum simply as income subsequently earned on property in which taxpayer possessed an interest on the date of her husband's death.

We submit, therefore, the facts are plain that taxpayer did not receive the $6230 item here in question in satisfaction of her asserted community property interest in her husband's estate; only the specific properties valued at $338,672 were received as such. The compromise agreement expressly so provided, and the two decrees of the California court so recognized. As such the $6230 income, unlike the $338,672 specific property, cannot be said to have been exempt from taxpayer's gross income as property acquired by bequest, devise or inheritance within the meaning of Section 22(b)(3) of the Revenue Act of 1936.[2] Rather, that item represents income earned and received by the estate during the course of administration, and "properly paid" by it during its taxable year to the beneficiary entitled thereto. Section 162(c) of the

[2]In addition to arguing that the $6230 income item as well as the $338,672 worth of property was received by her in satisfaction of her community property interest taxpayer also contends in the alternative that both sums were "received by her as an heir under Article Fourth of her husband's Will" (Br. 28) which permitted her to have that portion of his property which was established as representing her community property interest. It is apparent, however, that both contentions of taxpayer are predicated upon the premise that the $6230 income earned subsequent to her husband's death, was received by her in satisfaction of her community property interest as it existed on the date of his death. As previously pointed out, only the specific items of property valued at $338,672 were so received.

Revenue Act of 1936, *supra*. That income, therefore, although originally included in the gross income of the estate was properly deducted[3] by it in computing its net income. Having been "properly paid"[4] to the tax-

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[3]Taxpayer's argument that the $6230 income item, being a part of the gross income of the estate, could not be assigned by it so as to avoid taxability thereon misconceives the nature of the problem here presented, and completely ignores the plain mandate of Section 162(c) of the Revenue Act of 1936. We are not dealing here with the case of an assignment of income. We are, rather, dealing with the deduction allowed an estate in computing its net income for the taxable year, for any income received by it during the course of its administration and "properly paid" during the year to the beneficiary entitled thereto, in which case the amount so deducted is to be included in the net income of the beneficiary.

Likewise the so-called "coincidence" of the receipt and distribution of such amount during one taxable year, which taxpayer urges (Br. 26) should be ignored in the present case, is the precise condition which Section 162(c) expressly lays down as a requirement for permitting the deduction to the estate and imposing the tax upon the beneficiary.

[4]In this connection, there can be no question that taxpayer was entitled to the $6320 income earned after the date of her husband's death upon the specific property which was distributed to her by her husband's estate. *Clayes v. Nutter*, 49 Cal. App. 148, and *Estate of Brown*, 143 Cal. 450, relied upon by taxpayer, concern only the case of income from a testamentary trust. Their pertinency, if any, to the present proceedings, is with respect to the $5450 income item, discussed, *infra*, in the Government's brief. Moreover, we have here an order of a state court of competent jurisdiction expressly authorizing and directing, in accordance with the terms of the compromise agreement, the payment of the $6230 income item to taxpayer. The propriety of that distribution cannot, therefore, be questioned here. *Freuler v. Helvering*, 291 U.S. 35; *Letts v. Commissioner*, 84 F. (2d) 760 (C. C. A. 9th); *De Brabant v. Commissioner*, 90 F. (2d) 433 (C. C. A. 2d).

It is interesting to note that taxpayer, after vigorously contending (Br. 20-21) that neither the specific property valued at $338,672 nor the $6230 income thereon was received by reason of her interest under the testamentary trust created by her husband's will (which the Government does not deny), but rather was bequeathed to her as an heir (Br. 28), promptly proceeds to dismiss the pertinency of *Estate of Daly, supra*, upon the ground that that case did not involve income from property left in trust (Br. 33-34).

payer beneficiary during the taxable year, that amount is to be included in computing the net income of taxpayer. Section 162(c) of the Revenue Act of 1936 expressly so provides.[5] Cf. *Rosenberg v. Commissioner,* 115 F. (2d) 910 (C. C. A. 9th).[6]

II.

THE INCOME ITEM OF $5450 WAS "PROPERLY PAID" TO TAXPAYER WITHIN THE TAXABLE YEAR AND WAS THUS CORRECTLY INCLUDED IN HER TAXABLE INCOME UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.

The second item of income here involved relates to the sum of $5450, representing dividends on those

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[5]We agree with taxpayer that the income herein involved was initially correctly included in the gross income of the estate. However, it is pertinent to note that it might well be argued that, as a result of the compromise agreement, the taxpayer's community property interest never became subject to administration as part of her husband's estate. The court decree approving that agreement could well be said to have related back to the date of decedent's death and as having determined taxpayer's property interest in her husband's estate at that time. Under this view, any income subsequently earned on that property interest would be taxable to her directly, and would never be a part of the gross income of the estate. Cf. *Rosenberg v. Commissioner*, 115 F. (2d) 910 (C. C. A. 9th).

[6]In the *Rosenberg* case (p. 912), deduction for income earned during the course of administration was denied the estate upon the ground that the estate did not pay the income to the legatee.

Taxpayer also argues (Br. 17) that if it was proper for the estate to report as taxable income the dividends on the 6000 shares of Transamerica stock allotted to testator's son, then the estate should also be taxable on similar dividends distributed to taxpayer. It is not clear that it was "proper" for the estate to be taxed to the extent of any dividends which it actually distributed to the son. However, it appears from the record (R. 59) that all of the dividends which were actually distributed were correctly charged to the distributees. Those that were not so distributed were reported by the estate.

shares of stock which ultimately comprised the property of the testamentary trust set up in decedent's will after taxpayer, by virtue of the compromise agreement, had removed from the estate certain other stock and specific real property in satisfaction of her asserted community property interest in her husband's estate. The dividends amounting to $5450 had been earned after the death of taxpayer's husband and were received by the executors prior to July 29, 1937, the date upon which the corpus of the testamentary trust was distributed to the trustee by order of the California court. (R. 23, 57.) On December 22, 1937, by virtue of a separate court order,[7] the income of $5450 was distributed to the trustee, which, in accordance with the terms of the testator's will, distributed that income to taxpayer during the taxable year. The Commissioner, therefore, included that sum in taxpayer's income as representing income "properly paid" to her within the meaning of Section 162(c) of the Revenue Act of 1936.

Although taxpayer received this income from the trustee during the taxable year, she contends that she was not legally entitled thereto and that it therefore does not represent income "properly paid" to her within the meaning of Section 162(c). Taxpayer thus asserts that that item is taxable to the estate rather

[7]The income item of $5450 was distributed under the same court decree which distributed the income item of $6230, previously discussed. (R. 49-51.) Taxpayer, however, makes no claim that the former amount was received in satisfaction of her community property interest in her husband's estate. Cf. *Harrison v. Commissioner*, 119 F. (2d) 963 (C. C. A. 7th).

than to her. The Government, on the other hand, contends that this income was "properly paid" to the taxpayer, and that it was there properly deductible by the estate and includable in her income for the taxable year.

It is at least the general rule that in the case of gifts of income from a testamentary trust, the income beneficiary is entitled to all income accruing from the date of the death of the testator, unless the will specifically provides otherwise.[8] *Harrison v. Commissioner,* 119 F. (2d) 963 (C. C. A. 7th); *Brown's Estate,* 190 Pa. 464; *Bridgeport Trust Co. v. Fowler,* 102 Conn. 318; *Matter of Stanfield,* 135 N. Y. 292; *Baker v. Fooks,* 8 Del. Ch. 84; *Ayer v. Ayer,* 128 Mass. 575; *Will of Leitsch,* 185 Wisc. 257; *Mulcahy v. Johnson,* 80 Colo. 499; *Poole v. Union Trust Co.,* 191 Mich. 162; *Blair v. Blair,* 122 Me. 500; I Restatement of Trusts, Section 234; 4 Bogert, Trusts and Trustees, Section 811. Taxpayer, however, relies upon two California cases, *Estate of Brown,* 143 Cal. 450, and *Clayes v. Nutter,* 49 Cal. App. 148, as laying down the principle that the

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[8]The reason for this rule is generally stated to be that the income beneficiary ranks first in the consideration of the testator, and a contrary construction would take from the income beneficiary a portion of the income, add it to the corpus, and thus, at the expense of the income beneficiary, enlarge the estate of the remainderman, who presumably stands second to the income beneficiary in the consideration of the testator. *Will of Leitsch,* 185 Wisc. 257. Cf. *Estate of Emerson,* 139 Cal. App. 571. Although the general rule is not confined to cases where the corpus of the trust fund is specifically designated property, as in the instant case (rather than the residue of the estate), the fact that corpus is so identified furnishes even stronger indication that the settlor intended the remainderman should receive no more than the property specifically designated as corpus.

income beneficiary of a trust is not entitled to the income earned subsequent to the death of the testator and prior to the time that the trust comes into existence.[9] Assuming *arguendo* that the California rule is not as broad as the general rule (but see *Estate of Van Wyck,* 185 Cal. 49), we think that an examination of the authorities relied upon by taxpayer will demonstrate their inapplicability to the present case.

In *Estate of Brown, supra,* the court was of the opinion that the question whether income from a testamentary trust accrued to the income beneficiary from the date of the testator's death turned upon the provisions of the then Section 1369 of the California Civil Code.[10] That section provided that legacies bear interest from the time that they are due and payable, except that legacies for maintenance *or to the testator's widow* bear interest from the date of the testator's death. The beneficiary of the testamentary trust in the *Brown* case was the half sister of the testatrix's husband. The only issue therefore presented for the court's consideration was whether the

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[9]Taxpayer's argument would have such intervening income fall into the corpus of the trust. In the instant case, upon the death of taxpayer, the corpus of the trust will go to testator's son. (R. 47-48.) Taxpayer apparently is more willing to relinquish all rights to the $5450 item than she is willing to pay any tax thereon. There is, however, nothing in the record to indicate that taxpayer has returned, or intends to return, this item to the corpus of the trust. Moreover, it is pertinent to note that while the income item of $5450, together with the income item of $6230, were distributed by the court decree of December 22, 1937, the securities which formed the corpus of the testamentary trust had previously been distributed to the trustee under an entirely separate court order of July 29, 1937. (R. 22-23, 49-51, 57.)

[10]Now Section 162 of the Probate Code.

trust created was a maintenance trust, in which case the income therefrom, just as in the case of trusts for the benefit of taxpayer's widow, would accrue from the date of the decedent's decease. The court in the *Brown* case concluded that the trust was not a maintenance trust, and the provisions of Section 1369, which provide for the accrual of income from the date of taxpayer's death in the case of maintenance and widow legacies were therefore inapplicable. In the instant case, however, taxpayer is the widow of the testator. Thus while she readily concedes that in the case of a maintenance trust the beneficiary is entitled to the income accruing from the testator's death by virtue of Section 1369 (see also *Estate of Dare,* 196 Cal. 29), she fails to recognize that the California statute applies the same rule to a beneficiary who is the widow of the testator as it applies to any beneficiary of a maintenance trust. In both instances the income accrues for the benefit of the beneficiary from the date of the testator's death.[11] In the present case, therefore, taxpayer, as the widow of the testator, was entitled to the $5450 income which was earned from the date of her husband's death, and which was distributed to her irrespective of whether the trust created was for her support.[12]

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[11]There is some indication that in Delaware the general rule that income from a testamentary trust accrues to the income beneficiary from the date of the testator's death is limited to the widow, and possibly the children, of the donor. *Equitable Trust Co. v. Kent,* XI Del. Ch. 334.

[12]In *Clayes v. Nutter, supra,* relied upon by taxpayer, the beneficiary of the trust was a sister of the decedent.

But even apart from the above, it is the Government's contention, despite taxpayer's assertion to the contrary, that the trust herein was created for her support. The testator's will provided that the net income of the trust fund and estate should be paid to her during her life, and further "that if said income shall at any time be insufficient *for the proper support or care of my said wife*" then the trustee should at his discretion pay to her such portions of the principal of the trust fund and estate as should be deemed necessary. (Italics supplied.) (R. 47.) It is manifest, therefore, that the income of the trust was intended by her husband to be used for the support and maintenance of the taxpayer.

In asserting that the trust here involved was not established for her support, taxpayer points to the fact that she was receiving $1500 per month by way of a family allowance, as well as having reported some $57,000 net income in her individual tax return for 1937. Apart from the fact that her husband was obviously unaware of those circumstances at the time of setting up the trust in question, it has been specifically held that the receipt of a family allowance is "entirely immaterial" in concluding that a particular legacy was for the support and maintenance of the beneficiary. *Estate of Ballou,* 181 Cal. 61, 65. Likewise immaterial is the amount of income which taxpayer may have earned in the year subsequent to her husband's death; for a trust for the support of the income beneficiary may have been intended to provide for the maintenance of that beneficiary in the social and economic position in which he or she had been

formerly living, and not merely to provide the beneficiary with the bare necessities of life. *Hartford-Connecticut Trust Co. v. Eaton,* 36 F. (2d) 710 (C. C. A. 2d).

We think it clear, therefore, that under any construction of her husband's will taxpayer was entitled to the $5450 income earned by the securities placed in trust. That income was distributed as income to the trustee under the December 22, 1937, decree of ratable distribution of the California court, and was received by taxpayer during the taxable year.[13] The trustee by distributing that sum to taxpayer has determined that the money in question was income. Taxpayer, by accepting such sum as income to which she was entitled, has acquiesced in that determination. Since that determination was justified by the terms of the will and the law of California, taxpayer should not be permitted successfully to question it here. Cf. *Commissioner v. Bishop Trust Co.,* 136 F. (2d) 390 (C. C. A. 9th). We submit, therefore, that the $5450 received by taxpayer during the taxable year represents an amount "properly paid" to her as a beneficiary within the meaning of Section 162(c) of the Revenue Act of 1936. It was thus correctly deducted from the gross income of the estate and included in computing her income as beneficiary. Cf. *Commissioner v. Bishop Trust Co., supra; White v. Commissioner,* 41 B.T.A. 525.

[13]It should be noted that the $5450 dividends were paid from time to time by the issuing corporations to taxpayer and her son, as executrix and executor of the estate, who credited the dividends to the trust. (R. 23, 37-38.)

CONCLUSION.

The decision of the court below is correct and should be affirmed.

Dated, October 29, 1943.

Respectfully submitted,

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No. 10,505

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LINDA H. HALE,
Appellant,

vs.

CLIFFORD C. ANGLIM, Individually, and as Collector of Internal Revenue for the First District of California,
Appellee.

APPELLANT'S REPLY BRIEF.

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APPELLANT'S REPLY BRIEF.

SUMMARY OF CERTAIN FACTS.

Before responding to the argument advanced by Appellee in his Brief, it is desired to set forth for ready reference certain facts which appear from the record.

The will of Prentis Cobb Hale, Sr. provided in part that:

(a) The sum of $10,000.00 in cash and all automobiles owned by the testator be given to Appellant (R. 45), and

(b) Certain real and personal property be distributed to a trustee to be held in trust for the use and benefit of Appellant (R. 45); the net in-

come of the trust fund to be paid to Appellant during the term of her natural life (R. 47), and

(c) In the event Appellant should elect to take any portion of the estate as community property, then the property to be transferred in trust for Appellant under (b) next preceding should be reduced by the appraised value of the property taken as community property by Appellant (R. 44, 45).

Stating the facts regarding the will of Prentis Cobb Hale, Sr. negatively as to Appellant, it can be said that the will of Prentis Cobb Hale, Sr. did not:

(a) Make a bequest to Appellant of any money or other property equal to her community interest in her husband's estate, and neither did the will;

(b) Make either a specific or demonstrative bequest to Appellant of the particular securities distributed to Appellant under paragraph 1 of the compromise agreement of June 18, 1937, and neither did the will;

(c) Make any provision whatsoever for the payment to Appellant of the sum of $6230.00 representing *gross* amount of dividends received by the Estate of Prentis Cobb Hale, Sr. subsequent to his death and prior to the agreement of June 18, 1937.

Although the will of Prentis Cobb Hale, Sr. did not provide for the distribution to Appellant of any real property or securities or gross dividends thereon, un-

diminished by any expenses of the estate or testamentary trust, the compromise agreement of June 18, 1937 did provide that there should be delivered and there were actually delivered to Appellant:

(a) Certain real and personal property set forth in paragraph 1 of the agreement (R. 40, 41), and

(b) Pursuant to paragraph 8 of the agreement, all dividends on the securities referred to in paragraph 1 which had been received by the Executors, which dividends aggregate $6230.00 and are here in controversy (R. 36, 42, 61, 62).

RESPONSE TO ARGUMENT OF APPELLEE.

1. CONTENTION OF APPELLEE THAT SPECIFIC PROPERTY AND NOT THE INCOME THEREON IS SOLE MEASURE OF APPELLANT'S COMMUNITY INTEREST.

Appellee states that the $6230.00 income earned on the properties distributed to Appellant under paragraph 1 of the agreement of June 18, 1937 was not included in determining the value of the property received in satisfaction of her community interest (Br. 11). In support thereof Appellee refers to a portion of the agreement of June 18, 1937 which provides that there should be distributed to Appellant property having a value of $338,672.00

> "* * * in satisfaction of the said one-half interest in the said community property to which the said Linda Hoag Hale is entitled as aforesaid."

The procedure followed by Appellee in selecting approximately 3 lines of the entire agreement of June 18, 1937 to represent the complete intention and agreement of the parties is improper because it violates one of the fundamental rules concerning the interpretation of contracts.

Section 1641 of the California Civil Code reads as follows:

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

Section 1650 of the California Civil Code reads as follows:

> "Particular clauses of a contract are subordinate to its general intent."

The California Supreme Court in *Skookum Oil Co. v. Thomas,* 162 Cal. 539, 123 Pac. 363, at the bottom of page 366, used the following language in connection with the interpretation of a contract:

> "* * * The rules of construction forbid seizing upon some isolated provision of a contract in order to compel a certain result, and require that the intention be derived from a consideration of the entire instrument. * * *"

The California Court in *Nelles v. Macfarland,* 9 Cal. App. 534, 99 Pac. 980, at the bottom of page 981, used the following language in the course of its opinion concerning the interpretation of a contract:

> "* * * By Section 1641, Civ. Code, it is made the duty of the Court, in the interpretation of contracts, to give effect to every part thereof, if reasonably practicable. * * *"

Applying the fundamental principle of contract interpretation as set forth in the above quoted sections of the California Civil Code and decided cases to the issue here involved, it can be said that paragraph 8 of the agreement of June 18, 1937, pursuant to which Appellant received dividends in the amount of $6230.00, is just as much a part and parcel of the contract as the provisions of paragraph 1 pursuant to which the Appellant received certain real and personal property. No basis exists for selecting a particular three line portion of paragraph 1 and stating that it is representative of the exclusive intention of the parties. Instead, reference might well be made to that portion of the agreement of June 18, 1937 (R. 39, 40) which reads as follows:

> "Now, Therefore, This Agreement Further Witnesseth:
>
> "That, for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr. * * * the said Linda Hoag Hale, in her individual capacity and as executrix aforesaid, and the said Prentis Cobb Hale, Jr., in his individual capacity and as executor aforesaid, do hereby respectively covenant and agree as follows:"

The introductory paragraph to the agreement partially quoted above clearly indicates that the entire

agreement, and not only paragraph 1 thereof, represented the agreement of the parties and in its entirety was intended to represent the basis for compromising and settling without litigation the controversy which had arisen between the parties. There is, accordingly, no basis whatsoever for selecting a relatively small portion of one paragraph of the agreement as being representative of the entire agreement and intention of the parties.

Since Section 1650 of the California Civil Code hereinbefore quoted provides that particular clauses of the contract are subordinate to its general intent, it is clear that the quoted portion of the contract of June 18, 1937 relied upon by Appellee is subordinate to the general intention of the parties which is expressed in the contract (R. 39) to the effect that the agreement is "* * * for the purpose of compromising and settling, without litigation, the said controversy between the said Linda Hoag Hale and the said Prentis Cobb Hale, Jr. * * *"

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2. **CONTENTION OF APPELLEE THAT $6230.00 REPRESENTED INCOME EARNED ON APPELLANT'S COMMUNITY PROPERTY INTEREST.**

Appellee states in his brief (Br. 12) that the income of $6230.00 earned subsequent to her husband's death was alloted to Appellant not because it represented part of the value of her claimed community interest but *presumably because it represented income earned on that property interest, and to which she was en-*

titled, citing *Estate of Daly,* 202 Cal. 284, 260 Pac. 296 (italics supplied).

It is believed by Appellant that the decision in the case of the *Estate of Daly* cited by Appellee is not at all pertinent to a decision in our case because the facts in the *Estate of Daly* are entirely different from the facts in our case. It is also believed by Appellant that no basis in law exists to support the claim of Appellee italicized above to the effect that the $6230.00 received by Appellant was distributed to her

> "* * * presumably because it represented income earned on that property interest subsequent to her husband's death, and to which she was therefore entitled. * * *"

These two contentions of Appellant will be discussed in the order mentioned.

The facts in the *Estate of Daly* are stated by the Court to be as follows (260 Pac. at page 297):

> "* * * In the third paragraph the testator bequeathed one-half of 15,377½ shares of the Dairy Delivery Company, a corporation, then owned by him, to the Appellant * * * The Court made its order distributing to her (appellant) one-half of said stock, but denied the petition for the distribution to her of one-half of the income therefrom. It is from that portion of the order denying the distribution of the income from one-half of the stock that this appeal is taken."

The Court held that the widow was entitled to the dividends which accrued after the death of her husband on the stock which was specifically bequeathed

to her and stated in part as follows (260 Pac. at page 297):

> "The bequest to the widow of one-half of the stock of the Dairy Delivery Company being a 'legacy of a particular thing, specified and distinguished from all others of the same kind', was, of course, a specific bequest * * * (citing authorities) * * * and 'specific legacies carry with them all accessions by way of dividends or interest that may accrue after the death of the testator' * * * (citing authorities) * * *"

Appellant concedes the correctness of the decision of the California Supreme Court in the *Estate of Daly* but contends that the factual situation is such that the principle of the *Estate of Daly* has no application to our case. It will be observed that, in the *Estate of Daly,* a specific bequest of a particular stock was provided for in the decedent's will. In our case, the will of Prentis Cobb Hale, Sr. not only failed to make a bequest of specific securities or property to Appellant representative of her community interest but also omitted to make any general provision for property to be distributed to Appellant in an amount equal to her community interest, and instead, the will contained an express provision denying the Appellant's right to any community interest under the provision of Article Fourth of his will (R. 44) which reads in part:

> "I believe and declare that all property which I own, or in which I have any interest is my own separate property * * *"

The will therefore in our case purported to deny Appellant any community interest, and, if the will had been probated in accord with its provisions as drafted by the testator, Appellant would have succeeded to no community interest whatsoever in his Estate. Instead of accepting the provisions of her husband's will, Appellant asserted a community interest in his Estate and was prepared to litigate her rights if they were not conceded. The compromise agreement of June 18, 1937 resulted in the distribution to Appellant of the property referred to in paragraph 1 thereof (R. 40) and also the dividends of $6230.00 provided for in paragraph 8 thereof (R. 42). It is apparent therefore that Appellant received the real and personal property and the dividends, not under any provision of the decedent's will, but instead, under a compromise agreement which directly conflicted with the statement in decedent's will that he believed all of his property was his own separate property. It is clear, therefore, that Appellant received the property obtained by her from her husband's Estate, not by specific bequest, as in the case of the *Estate of Daly,* but instead, by reason of a negotiated contract not only entirely independent of but in direct conflict with the provisions of her husband's will.

It is desired to point out in this connection that the failure to recognize this basis for the acquisition by Appellant of the property and dividends received by her, formed one of the fundamental errors in the opinion of the District Court because it is observed

that the opinion of the District Court (R. 16) uses the following language which apparently was taken directly from the decision of the California Supreme Court in the *Estate of Daly:*

> "* * * a specific bequest carries with it all accessions by way of dividends or interest that may accrue after the death of testator * * *"

Since no specific bequest or in fact any bequest to Appellant by the will of her husband is involved in our case, it is submitted that the decision in the *Estate of Daly* is wholly irrelevant and that the opinion of the District Court based largely thereon is in error to the extent that it is founded upon such claimed authority.

Reference will now be made to that portion of Appellee's Brief in which it is stated (Br. 12) that the $6230.00 represents income earned on the community property interest of Appellant and to which she was entitled.

Neither Appellant nor Appellee makes any contenition that the specific items of property distributed to Appellant under paragraph 1 of the agreement of June 18, 1937 are identifiable as particular items of community property of the type recognized for Federal taxes as belonging to the community. Indeed, the record is clear (R. 58) that it was not possible to ascertain the portion of the decedent's estate that represented community property acquired after July, 1927. Accordingly, the property distributed to Appellant under paragraphs 1 and 8 of the agreement of

June 18, 1937 is considered to be merely representative of the value of appellant's community interest which was agreed upon in order to avoid contemplated litigation. It follows, therefore, that the income from such property is similarly not capable of being identified as income from community property and most certainly there is no showing in the record that the dividends of $6230.00 represented income from community property acquired after July, 1927, which community property is the only type recognized for Federal income tax purposes. Under these circumstances, it is contended by Appellant that, even if the income of $6230.00 attributable to some of the specific items of property distributed to her is regarded as community income (a fact which is of course not conceded by Appellant), still such income would not belong as a matter of right to Appellant under the laws of the State of California and is not taxable to Appellant under the Federal Court decisions presently to be cited.

The California Probate Code provides in part as follows (Section 202):

> "Community property passing from the control of the husband, either by reason of his death or by virtue of testamentary disposition by the wife, is subject to his debts and to administration and disposal under the provisions of Division III of this Code * * *"

By the plain provision of Section 202 of the California Probate Code, therefore, the income applicable to community property does not as a matter of right

belong to the surviving wife, but, instead, it is subject to administration and the payment of debts. This view is also confirmed by the decision of this Court in the case of *Commissioner v. Larson,* 131 F. (2d) 85, to be referred to presently.

It is further observed that, under the agreement of June 18, 1937, Appellant received, not an item of *net* income, but rather the *gross* dividends on certain securities (see Appellant's Opening Brief, page 15). Whatever plausibility may attach to the claim that Appellant as a matter of law was entitled to an amount of *net income* by reason of her community interest or as the life tenant under the testamentary trust, certainly the agreement of June 18, 1937 can form the only basis for distributing to Appellant out of estate funds the *gross* dividends of $6230.00 undiminished by any expenses whatsoever.

The question of the treatment to be accorded income from community property during administration of the husband's estate has been directly presented to this Court and decided in two cases; namely, *Rosenberg v. Commissioner,* 115 F. (2d) 910 (C.C.A. 9), decided November 29, 1940, and *Commissioner v. Larson,* 131 F. (2d) 85 (C.C.A. 9), decided October 21, 1942.

In the case of *Rosenberg v. Commissioner,* taxpayer contended (115 F. (2d) at page 912):

> "* * * that the wife's share of the community property, for the purpose of the Federal income tax, 'is not and cannot be a part of the "estate" of her deceased husband.' "

The Court stated it was unable to agree with the contention made by the taxpayer and stated its conclusion as follows (115 F. (2d) at page 912):

> "We conclude that the income derived from the community property of the decedent in the hands of the executor of his will was subject to taxation as a part of the income of the estate."

In the case of the *Commissioner v. Larson,* the question for decision was the treatment for income tax purposes of community property income received by the Estate of the deceased husband during administration. The Court concluded that community income received during administration should be taxed to the Estate of the deceased husband and used the following language in the course of its opinion (131 F. (2d) at page 87):

> "* * * It has been repeatedly said that upon the death of either spouse, the entire community estate, and not merely the half interest of decedent, is subject to administration * * * (citing cases) * * *"
>
> "We think it is clear from these authorities, that the 'ownership' of the income from Community property during administration and liquidation thereof, is in the executor or administrator, and that therefore he should report such income in the income tax return of the estate."

Summarizing Appellant's position with respect to this phase of Appellee's argument, it can be said:

(a) There is nothing in the record to show that the income of $6230.00 distributed to Appel-

lant represented income from specific items of community property and, on the contrary, the record shows (R. 58) that it was impossible to ascertain the extent of the community property of the estate acquired subsequent to July, 1927;

(b) Even if the record showed that the $6230.00 represented income from specific items of community property acquired subsequent to July 1927, still, under the California Probate Code (Section 202), such income was subject to administration and the payment of debts under California law and was therefore income to which Appellant was not entitled as a mater of law;

(c) Even if the dividends of $6230.00 are conceded to represent income from community property acquired subsequent to July 1927, still, under the decisions of this Court, rendered in the cases of *Rosenberg v. Commissioner* and *Commissioner v. Larson* heretofore cited, such income is taxable to the estate of the decedent and not to Appellant.

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3. CONTENTION OF APPELLEE THAT DECREE OF DISTRIBUTION MADE BY PROBATE COURT SUPPORTS POSITION THAT $6230.00 WAS NOT A PART OF APPELLANT'S COMMUNITY INTEREST.

Appellee suggests that because the income of $6230.00 was distributed to Appellant by a decree entirely independent of the decree by which the real property and securities were delivered, said income

was not regarded by the Court as a part of Appellant's Community interest (Br. 12, 13, 14).

Appellant submits that the conclusion of the Appellee concerning the theory and opinion of the California Probate Court in rendering its decree distributing the income of $6230.00 to Appellant is unwarranted and, in support of this contention, submits the observation that the decree of December 22, 1937 distributing this income to Appellant was made under and pursuant to the specific agreement of the parties to the agreement of June 18, 1937 (R. 43). That is, paragraph 8 of the agreement of June 18, 1937 specifically provided that the dividends there involved might be distributed pursuant to a Decree of Partial Distribution. Accordingly, the Court, in rendering its decree, was merely carrying out the purpose and intention of the parties to the agreement of June 18, 1937. The Court did not render an opinion in the matter. There was no contest concerning the decree. There was a total absence of any issue for the Court to decide and, as a consequence, it is difficult to perceive upon what basis the Court can be stated to have an opinion or theory if no issue or problem was presented to the Court. If any intention or purpose is to be assigned to the Decree of Partial Distribution, it is the intention which must be ascribed to the parties to the agreement of June 18, 1937 and not to the Court which rendered a Decree, in the application for which all parties acquiesced.

It is fundamental that decrees rendered by the Probate and other Courts of the various states are not

binding upon the Treasury Department and have no effect for Federal tax purposes unless there is an issue actually litigated by persons having adverse interests. See

Freuler v. Helvering 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634.

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4. **CONTENTION OF APPELLEE THAT THE $6230.00 WAS PROPERLY PAID TO APPELLANT AND THEREFORE DEDUCTIBLE BY THE ESTATE UNDER SECTION 162(c) OF THE REVENUE ACT OF 1936.**

The Appellee contends that the amount of $6230.00 was properly paid by the Estate to Appellant in 1937 and was, therefore, deductible by the Estate and taxable to Appellant as income under Section 162(c) of the Revenue Act of 1936 (Br. 14, 15, 16). Section 162(c) is quoted in full in the Appendix to Appellant's Opening Brief and provides in part that

> "* * * there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary."

Appellant contends that in order to be deductible to the Estate and taxable to the beneficiary, the amount of income of the estate or trust must be properly paid or credited to a legatee, heir or beneficiary *as income.*

See *Burnet v. Whitehouse,* 283 U. S. 148, 75 L. Ed. 917, 51 S. Ct. 374. In this latter case, the will of the decedent gave to Mrs. Whitehouse an annuity. The annuity was paid out of income of the estate and the question was whether the amount of the annuity was deductible by the estate and taxable to the recipient or whether the amount should be reported by the estate. The United States Supreme Court held that the amount received by Mrs. Whitehouse was not taxable as income and stated that Section 219 of the Revenue Act of 1921 (which provided that there should be included in the taxable income of an individual the income of estates including "* * * income which is to be distributed to the beneficiaries periodically * * *") applies only to income paid as such to a beneficiary. The Court said:

> "* * * but clearly enough, we think, this section applied only to income paid as such to a beneficiary * * *"

As a further illustration of an instance in which income received by an estate as such and distributed by the estate to an heir is taxable to the estate of a decedent and is not taxable to the recipient, see *Buck v. McLaughlin,* 48 F. (2d) 135 (C.C.A. 9). In this case the Court held that the amount received by a widow as a family allowance pursuant to California law was not taxable income to her and in the course of its opinion stated in part as follows (48 F. (2d) at 137):

> "We think it quite immaterial in determining the taxability of the amount received by the

widow as to whether it comes from the corpus or income in the hands of the executor * * *"

As pointed out in Appellant's Brief (pages 19, 20), not all items of estate income distributed by an estate may be deducted by the estate and taxed to the recipient. When gross or net income is received by an estate and is paid out in settlement of money loaned or advances made, or in settlement of other claims, the payee may be in receipt of income received by the estate, but if he does not receive such funds *as income,* certainly the recipient is not taxable upon the receipt of same. It is Appellant's contention that the $6230.00 was paid to her by the Estate of Prentis Cobb Hale, Sr. in order to settle her claim of community interest in the decedent's Estate and on the contrary that sum of $6230.00 was not paid to her as income. See in this connection Appellant's previous comments in this Brief showing that she had no right under her husband's will to any community interest in her husband's estate and, therefore, the amount of $6230.00 together with the real and personal property referred to in paragraph 1 of the agreement of June 18, 1937 must have been paid to Appellant in settlement of her community interest and not by reason of any fundamental right to the income on such property.

It is further observed that the answer of Appellee shows the amount of $6230.00 to have been received under the terms of the agreement of June 18, 1937 (Complaint, paragraphs IV and V (R. 3-5) and Answer, paragraphs II and III (R. 8, 9)).

As a corollary to the proposition that the item of $6230.00 was received by Appellant under the terms of the compromise agreement of June 18, 1937, Appellant contends that the decision in *Lyeth v. Hoey,* 305 U. S. 188, 59 S. Ct. 155, 83 L. Ed. 119, is controlling to the effect that the property so received by Appellant is received by reason of her interest as an heir of her husband's estate and therefore exempt from income tax under Section 22(b)(3) of the Revenue Act of 1936. This latter section is quoted in full in Appendix to Appellant's Opening Brief.

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5. CONTENTION OF APPELLEE THAT $5450.00 PAID TO APPELLANT WAS PROPERLY PAID TO HER AND TAXABLE TO HER.

Appellee contends (Br. 16) that the amount of $5450.00 distributed to Appellant from the testamentary trust under the will of Appellant's husband was properly payable to Appellant and therefore taxable to her under Section 162(c) of the Internal Revenue Code.

The circumstances surrounding the receipt by Appellant of the item of $5450.00 are substantially different from the circumstances concerned with the receipt of the $6230.00 heretofore referred to in this brief. The dividends of $5450.00 here involved were received by the executors of the Decedent's estate prior to July 29, 1937, the date certain securities were distributed to the testamentary trustee. It is Appellant's position that, under the decisions of the Cali-

fornia Supreme Court and Appellate Court in the following cases, the amount received by Appellant was not legally payable to her and therefore the receipt of this money by her may not be regarded as income to Appellant.

In the *Estate of Brown,* 143 Cal. 450, 77 Pac 160, and *Clayes v. Nutter,* 49 Cal. App. 148, 192 Pac. 870, the rule was stated unqualifiedly that, unless a testamentary trust can be regarded as a trust for maintenance, the life tenant is not entitled to the income therefrom accruing from the date of death and prior to the distribution of the trust property to the trustees. The following quotation is taken from the case of *Clayes v. Nutter,* 192 Pac. at page 871:

> "* * * Under this will it was necessary for the trustees to receive the trust property and invest the same, so as to obtain an income before it was possible for them to make any payment to Mrs. Clayes under the terms of the will."

In other words, until the trust comes into existence by formal distribution of the trust property, no trust exists from which income may be paid to the life tenant. Accordingly, if, as in the Appellant's case, moneys are paid to her to which she has no legal right, such funds when received do not constitute taxable income under the decision in *Freuler v. Helvering,* 291 U. S. 35, 54 S. Ct. 308, 78 L. Ed. 634. This latter case states very clearly that the test of taxability to the beneficiary is not receipt of income but the present right to receive it. The Court further stated (291 U. S. at page 42):

"* * * Clearly an overpayment to a beneficiary by mistake of law or fact, would render him liable for the taxable year under consideration, *not on the amount paid, but on that payable* * * *" (italics supplied).

Appellee suggests that the trust here involved might be regarded as a trust for maintenance resulting in the right to pay Appellant the income on the trust property from the date of death and cites *Estate of Ballou,* 181 Cal. 61. The *Estate of Ballou* involved a consideration of whether a legacy in the amount of $10,000.00 given to an adopted child should be regarded as a legacy for maintenance for the purpose of computing interest and the Court held that it should be so regarded. It will be observed that in Appellant's case we are dealing with the question of income from a testamentary trust and not a specific legacy, and, accordingly, the *Estate of Ballou* involves a different set of facts. It certainly is not in point in comparison with the authorities cited by Appellant; namely, *Estate of Brown* and *Clayes v. Nutter,* which cases directly concern the date as of which income should be paid to a life tenant from a testamentary trust established by a testator.

In the event Appellant's husband had desired to cause the testamentary trust to be regarded as a trust for maintenance with the consequence that the income applicable thereto would be payable from date of death, it would have been only necessary for him to have stated that the trust was a trust for maintenance or that the income therefrom should be paid from the

date of death. See in this connection Article Twelfth of testator's will in which he provides that $10,000.00 be delivered to Appellant "at the earliest possible moment after my death" (R. 45). The trust, however, contained no such provisions, and, instead, it was provided in Article Fourth of the testator's will (R. 44, 45) that the property of the trust be diminished to the extent of any property distributed to Appellant under a community property claim. It appears therefore that, so far as the intention of the testator may be determined by reference to the language used in creating the trust, he did not consider it necessary to designate it as a trust for maintenance.

Notwithstanding Appellee's comments to the contrary (Br. 21), Appellant further submits that, since she was adequately provided for by income from sources independent of the testamentary trust such as the family allowance of $1500.00 per month (R. 44) and other income, the aggregate of which was $57,016.72 for the calendar year 1937 (R. 64), the testamentary trust can not be regarded as a trust for her maintenance. In this connection, reference is again made to the *Estate of Brown,* 143 Cal. 450, 77 Pac. 160, in which a testamentary trust which directed $20.00 per month to be paid to a half-sister of the decedent's husband was not regarded as a trust for maintenance, even though the life tenant was a confirmed cripple and was dependent upon the income of the trust for support. If, under such circumstances, the Court was of the view that the life tenant was not entitled to the income of the trust property until it

was distributed to the trustees, it is difficult to understand how a different conclusion could be reached under the circumstances surrounding the testamentary trust in Appellant's case.

Summarizing this phase of Appellant's case, it is contended that Appellant was not entitled to the amount of $5450.00 in dividends received from the testamentary trustees representing income accrued between the date of her husband's death and the date the securities were distributed to the testamentary trustees and that, under the decision in *Freuler v. Helvering* heretofore cited, the test of taxability is not the receipt of income but the right of a beneficiary to receive the same.

Dated, San Francisco,
November 8, 1943.

Respectfully submitted,
L. W. WRIXON,
Attorney for Appellant.

No. 10507

United States

Circuit Court of Appeals

For the Ninth Circuit.

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court for the Northern District of California, Southern Division

No. 23725S.

LIBERTY MUTUAL INSURANCE COMPANY, a mutual insurance company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and Charles F. Keil, Jr.,

Respondents.

BILL OF COMPLAINT FOR MANDATORY INJUNCTION

Come now the libelants above named and for bill of complaint against the respondents allege:

I.

That the libelant Liberty Mutual Insurance Company is now and was at all times herein mentioned a mutual insurance company organized and existing by virtue of the laws of the State of Massachusetts, and authorized by the United States Employees' Compensation Commission to provide compensation insurance protecting employees under the Longshoremen's and Harbor [1*] Workers

*Page numbering appearing at foot of page of original certified Transcript of Record.

Compensation Act, hereinafter referred to as the "Act" and the insurance carrier provided by libelant Contractors Pacific Naval Air Bases, an association, in accordance with the provisions of the Act.

II.

That the libelant Contractors Pacific Naval Air Bases is now and was at all times herein mentioned an association of contracting firms engaged in building and erecting military and naval installations for the United States, particularly in the islands of the Pacific Ocean.

III.

That the respondent Warren H. Pillsbury is now and was at all times mentioned herein, the Deputy Commissioner of the 13th Compensation District under the provisions of the Act.

IV.

That the respondent Charles F. Keil, Jr. at the time of occurrence of the accident hereinafter mentioned was under a contract of employment with libelant Contractors Pacific Naval Air Bases to proceed from Denver, Colorado, to the Hawaiian Islands to render service at a military base of the United States on the Island of Oahu, Territory of Hawaii, and was transiently residing in the City of Oakland, County of Alameda, State of California, while awaiting transportation by ship to said Island of Oahu.

V.

That on or about the 5th day of August, 1942, respondent Charles F. Keil, Jr., filed a claim before the United States Employees' Compensation Commission for benefits under the Longshoremen's and Harbor Workers' Compensation Act, as amended under the Act of Congress of August 16, 1941, contending that on Sunday evening, May 24, 1942, at or near the corner of Seventh and Franklin Streets, Oakland, California, he was struck by an [2] automobile, sustaining a fracture of the left leg. Said claim was numbered "Case No. BA-89, Claim No. DB22."

VI.

That the cause was primarily within the jurisdiction of the Deputy Commissioner for the Pacific District with headquarters at Honolulu, Territory of Hawaii, but, with the approval of the Employees' Compensation Commission, and as permitted by law, was transferred to the 13th Compensation District, Warren H. Pillsbury, Deputy Commissioner.

VII.

That on August 11, 1942, this matter was heard before respondent Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, 417 Market Street, San Francisco, California. That at said hearing respondent Charles F. Keil, Jr. claimed that compensation was due him because of injuries sustained in an automobile accident on May 24, 1942, at Oakland, California, as aforesaid

while said respondent was under contract with libelant Contractors Pacific Naval Air Bases to proceed to the Hawaiian Islands for service there. Libelants contended that respondent Keil was not in the course of his employment at the time of the accident; that said accident did not arise from the employment; that he had not arrived at the point of employment and that the accident occurred in the evening at a time when no services were being rendered to the employer. That a copy of a transcript of the testimony taken at said hearing of August 11, 1942, is appended hereto marked "Libelants' Exhibit No. 1."

VIII.

That at said hearing of August 11, 1942, the following facts were agreed to by the respective parties (Transcript, Libelants' Exhibit No. 1, pages 3 and 4.):

"1. That on or about May 24, 1942, claimant [3] was under an existing contract of employment with defendant Contractor Pacific Naval Air Bases, and that at said time said employer had secured the payment of compensation under said Military Bases Act by insurance in defendant Liberty Mutual Insurance Company.

"2. That the contract was for the performance of service at an air, military or naval base of the United States outside the Continental United States, and the claim is within the provisions of said Military Bases Act and the jurisdiction of the appropriate Deputy Commissioner.

"3. That claimant met with accidental injury on May 24, 1942, the injury being due to his being hit by an automobile at Seventh and Franklin Streets, Oakland, California, and causing a fracture of the left leg.

"4. No claim is made of intoxication contributing to said injury, or of wilfully self-inflicted injury.

"5. That medical treatment has not been furnished by defendants. Claimant has received care to date at the Alameda County Hospital. If the injury is found to be compensable and if the Alameda County Hospital makes a charge for such treatment, award may be entered in favor of claimant against defendants for the payment of the reasonable medical expenses incurred.

"6. Notice of injury within 30 days admitted.

"7. That the earnings provided for by said contract of employment may be taken for the purpose of this proceeding at $40.00 a week plus board and room of the reasonable value of $10.50 a week, subject to the provisions concerning the maximum compensation rate contained in said Act.

"8. That no compensation has been paid.

"9. That claimant has been totally disabled from labor from the time of his accident to the present time, and will be totally disabled from labor as a result thereof for a period of time in the future not here determined.

"The only ISSUE is whether such injury occurred in the course of and arose out of claimant's employment."

IX.

That at the said hearing of August 11, 1942, counsel for [4] defendants (the libelants herein) introduced in evidence the aforementioned contract of employment between said Charles F. Keil, Jr. and the employer, Contractors Pacific Naval Air Bases, the material paragraphs of which appear in the Transcript (Libelants' Exhibit No. 1), pages 12 and 13.

X.

That at said hearing of August 11, 1942, the only witness to testify was respondent Keil, whose testimony appears in the Transcript of said hearing (Libelants' Exhibit No. 1) at pages 5 to 11. Respondent Keil testified that his home was in Denver, Colorado, where he was hired; his transportation by bus was furnished by the employer and he left Denver on May 12, 1942, arriving at Oakland two days later. At Oakland, his contract of employment was re-executed in fuller form, and respondent prepared to sail for Hawaii on May 21st, but, accommodations apparently being limited, only three members of respondent's crew were taken and respondent was told to return to his hotel to await the sailing of another steamer. (Transcript, pp. 5-8.) As to the accident in which he was injured, respondent Keil testified that on the evening of May 24, 1942, (which was a Sunday) at about 8:30 P. M. he was out walking with a Mr. Olson. The two had had supper about 6 P. M. and then went for a stroll, which eventually took them to the neighborhood of Seventh and

Franklin Streets, Oakland, where respondent was hit and injured by an automobile. Respondent and his companion were returning to their hotel at the time of the accident. Respondent testified that he and his companion were walking for pleasure and were not on an expedition to any particular place. Respondent was paying for his board out of his salary while living in Oakland and until he should embark for Hawaii.

XI.

That thereafter and on September 10, 1942, the said Deputy [5] Commissioner Warren H. Pillsbury made his Compensation Order and Award of Compensation, finding, among other things, that "on the evening of May 24th, after dinner, and while strolling about the City of Oakland, and not on any diversion from his route to his place of employment under said contract, he was struck by an automobile on a public street, sustaining a fracture of the left leg. That under the circumstances stated above, said injury occurred in the course of and arose out of his employment." The Award is as follows:

> "That the employer, Contractors Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to claimant compensation as follows: The sum of $282.14 forthwith as of August 11, 1942, and the further sum to claimant of $25.00 a week thereafter, payable in installments each two weeks until the termination of his dis-

ability or the further order of the Deputy Commissioner."

A copy of said Compensation Order-Award of Compensation is appended hereto marked "Libelants' Exhibit No. 2."

XII.

That said Compensation Order and Award of Compensation are not in accordance with law or with the provisions of the Longshoremen's and Harbor Workers' Act in this, that there was not at any time herein mentioned, or at any other time, any substantial evidence before said Deputy Commissioner to the effect that claimant Charles F. Keil, Jr. (respondent herein) suffered accidental injuries while in the course of his employment. Nor is there any evidence whatever to the effect that said accidental injuries arose, naturally or otherwise, from said employment within the meaning of the Act. To the contrary, respondent's own testimony, being the sole evidence as to the accident, proves that respondent was injured on a Sunday night while strolling about the City of Oakland for his own pleasure and not on any business or errand for the employer.

XIII.

That libelants herein refer to the accompanying Memorandum [6] of Points and Authorities as stating additional facts and reasons for the issuance of the injunction herein requested.

XIV.

That Liberty Mutual Insurance Company is joined as a libelant herein because the Longshoremen's and Harbor Workers' Compensation Act provides for the substitution of the insurance carrier for the employer.

XV.

That all the notices and the duly transcribed original notes of testimony taken at the hearing, and the original Compensation Order and Award of Compensation of Deputy Commissioner Warren H. Pillsbury are in the custody of said respondent and it is necessary for this Court to have possession of the record of said hearing and of all the relevant papers now in the possession of said Deputy Commissioner in order to determine whether or not the Compensation Order and Award of Compensation of said Deputy Commissioner is in accord with law.

XVI.

That libelants will be irreparably damaged if a mandatory injunction annulling and vacating said award is not granted them by this Court.

XVII.

That libelants have not the right to appeal from the aforesaid Compensation Order and Award of Compensation, and have no plain, speedy or adequate remedy available other than the redress requested by libelants in the form and manner specified in the Act.

Wherefore, basing their bill of complaint and petition on said Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927, as amended, and upon the Act of Congress approved August 16, 1941, to provide compensation for disability or death resulting from injury to persons employed at military, [7] air, and naval bases acquired by the United States from foreign countries, and on lands occupied by the United States for military or naval purposes outside the continental limits of the United States, with certain exceptions, libelants herein respectfully pray:

(1) That Deputy Commissioner be ordered to deliver to this Court, or the Clerk thereof, a certified transcript of any claim he has for compensation made in this matter, all notices, transcribed notes of testimony, exhibits, the Compensation Order and Award of Compensation aforesaid, and all other papers, records or matters relating to this cause or the hearing thereof.

(2) That a time and place be set so that said matters and record may be fully heard and considered by this Court.

(3) That said Compensation Order and Award of Compensation made by said Deputy Commissioner against libelants herein be annulled, reversed, vacated and set aside by mandatory injunction or otherwise as provided in the Act.

(4) That libelants be granted such other and further relief as may be meet and proper in the premises.

Dated San Francisco, California, October 9, 1942.

THEODORE HALE
CHARLES B. MORRIS
CARROLL B. CRAWFORD
Attorneys for Libelants. [8]

State of California
City and County of San Francisco—ss.

F. O. White, being first duly sworn, deposes and says that he is the Resident Claims Manager of Liberty Mutual Insurance Company, one of the libelants herein, and as such Resident Claims Manager is authorized to verify the foregoing Bill of Complaint for Mandatory Injunction; that he has read the said Bill and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to these matters that he believes it to be true.

F. O. WHITE

Subscribed and sworn to before me this 9th day of October, 1942.

E. J. CASEY
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed] Filed Oct 10 1942. [9]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF BILL OF COMPLAINT FOR MANDATORY INJUNCTION

STATEMENT OF FACTS

At Denver, Colorado, on or shortly before May 12, 1942, Charles Keil, Jr., claimant before Deputy Commissioner Pillsbury and respondent here, signed a preliminary contract of employment with libelant Contractors Pacific Naval Air Bases for service on a military or naval base in the Hawaiian Islands. He left Denver by stage at his employer's expense as to fare only on May 12, 1942, and arrived in Oakland, California, on May 14, [10] 1942, where he signed a final contract.

Respondent Keil had expected to leave by ship for the Hawaiian Islands on May 21st, but only three of his party were taken aboard. Respondent returned to his hotel in Oakland to await the sailing of the next ship. During this time he was under pay from his employer but was not to receive his board until he embarked for the Islands.

On Sunday, May 24th, at about 8:30 in the evening, while returning to his hotel after a stroll about Oakland with a companion, respondent Keil was struck by an automobile at Seventh and Franklin Streets and suffered a broken leg. He filed a claim for compensation with the Deputy Commissioner under the Longshoremen's and

Harbor Workers' Act, and after a hearing which disclosed the aforementioned facts, the Deputy Commissioner made an award in the employee's favor as set forth in libelants' bill of complaint and the exhibits thereto.

The sole issues herein are (1) whether or not, within the meaning of the Act, said injuries were suffered while the employee was in the scope of his employment, and (2) whether they arose from said employment so as to entitle the employee to workman's compensation under the Act.

It will be noted that the Deputy Commissioner has found that respondent Keil, when injured, was "not on any diversion from his route to his place of employment under said contract."

SCOPE AND CHARACTER OF THE ACT

The Longshoremen's and Harbor Workers' Compensation Act follows generally the compensation acts of the several states, though its scope is, of course, more limited. Until August 16, 1941, when Congress enacted a bill extending the Act to certain workers on naval and military bases outside the Continental United States, the Act applied only to longshoremen, [11] stevedores and other land workers injured on vessels lying in or plying the navigable waters of the United States. One exception to the above statement is found in the District of Columbia where the Act's scope has been widened by act of Congress.

One section of the Act which particularly concerns the case at bar is as follows:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment."

Longshoremen's and Harbor Workers' Compensation Act, Sec. 1, subd. 2, (33 U. S. C. A. Sec. 902.)

As to the duty and authority of the Deputy Commissioner and reviewing court it has been said:

"The findings of a Deputy Commissioner must be sufficient under the law to support the award."

Ocean S. S. Co. v. Lawson, 68 Fed. 2d 55.

"If the Deputy Commissioner ignores proper evidence presented, it is an error of law; if prejudice results, his order is not in accordance with law and the Court will give relief."

Grant v. Marshall, 56 Fed. 2d 654. [12]

SPECIFICATIONS OF ERROR IN THE AWARD

1. Inasmuch as the employee was a mechanic (steamfitter, fireman and boiler maintenance man) the Deputy Commissioner erred in finding that said employee was injured in the course of his

employment, when, as a matter of fact, he was injured while on business or pleasure of his own after dinner on a Sunday night while he was strolling about the City of Oakland on no business or errand for the employer. This would be true whether the employee were traveling for his employer or not. (Torrey v. Ind. Acc. Com. 132 Cal. App. 303, 22 Pac. (2d) 525.)

2. The Deputy Commissioner erred in finding that the employee's injury arose out of his employment when, as a matter of fact, said employee was a mechanic, off duty, not on business for his employer, strolling about the City of Oakland for his own pleasure, and the injury was caused when the employee was struck by an automobile.

3. The Deputy Commissioner erred in finding that the employee suffered an industrial injury at all. This is true because of the facts mentioned in Paragraphs 1 and 2 above, and because of the further fact that the employment (even had he been working at his trade) did not result in exposing the employee to greater risk or danger from reckless automobile drivers traversing the streets than that incurred by all pedestrians, the "people of the neighborhood" or the "commonalty", as various judicial opinions have expressed the matter.

LAW APPLICABLE TO THE FACTS OF INSTANT CASE

It will be observed that the Deputy Commissioner's award disregards well settled principles

of compensation law for the determination of scope of employment, and thus makes the employer in effect the insurer of the well being and safety of the employee, no matter how or where he be injured, as long as the employee refrains from intoxication and willful injury [13] of himself. (Mobile and O. R. Co. v. Ind. Comm. 28 Fed. (2d) 228.) The nature of these rules is most exhaustively and yet concisely set forth in the opinion in Mobile and O. R. Co. v. Ind. Comm., supra, a quotation from which follows:

"Compensation acts in general substitute a new cause of action, a new proceeding, for common law rights and liabilities in cases of injuries to employees. The intention was to secure workmen and dependants against becoming objects of charity by making a reasonable compensation for all such accidental calamities as are incidental to the employment. Under such acts injuries to employees are to be considered no longer as results of fault or negligence, but as the products of the industry in which the employee is concerned. Compensation for such injuries is, under the theory of such statutes, like any other item in the cost of production or transportation, and ultimately charged to the consumer. (See 28 R. C. L. p. 714.) * * * The law substitutes for liability for negligence an entirely new conception; that is, if the injury arises out of and in the course of the employment, under the doctrine of man's humanity to man, the cost must be one of the elements to be liquidated and balanced in money in the course of consump-

tion. In other words, the theory of the law is that, if the industry produces an injury, the cost of that injury shall be included in the cost of the product of the industry. Hence the provision that the injury must arise out of and in the course of the employment. [14]

The theory of the act calls logically for a liberal construction of its provisions, but there are reasonable limitations, and the operation of the law should not be stretched by any extraordinary principle to the extent of making the employer the insurer of the safety and well being of the employee. There must be, arising from the employment in the industry, some fact, some act, some occurrence, that produces the injury. The act is not to be considered as a substitute for disability or old age compensation.

The words themselves, "arising out of the employment," would seem to be clear, yet they have been provocative of much discussion in various courts. The Massachusetts Court's discussion (McNicol's Case, 215 Mass. 497, 102 N. E. 697, L. R. A. 1916 A, 306), of the principle involved is as enlightening as one may find. The court there says that the injury, in order to warrant the payment of compensation, 'must both arise' out of and also be received in the course of the employment. Neither alone is enough. * * * An injury is received "in the course of" the employment when it comes while the workman is doing the duty which he is employed to perform. It "arises out of" the employment, when there is a

* * * causal connection between the conditions under which the work is required to be performed and the resulting injury. * * * If the injury can be seen to have * * * been [15] contemplated by a reasonable person familiar with the whole situation, * * * then it arises "out of" the employment. * * * The causative danger must be peculiar to the work and not common to the neighborhood. * * * It need not have been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence.'

Mobile and O. R. Co. v. Ind. Comm. 28 Fed. (2d) 228, supra.

POINTS DISTINGUISHING THIS CASE FROM OTHERS SOMEWHAT SIMILAR

It is not, of course, contended by anyone in the instant case that respondent Keil was injured while actually working at his trade, while riding on a stage or train in transit from Denver to Oakland, while riding from a stage or train to his hotel, while in a street car or other conveyance en route to or from the docks from which he was to sail. Such circumstances, if they existed, would make a different case.

When injured the employee was completely master of his own time, course and movements. He was exposed to no greater danger or risk because of his employment than was any other

pedestrian near Seventh and Franklin Streets at the time of the accident.

The only manner in which the employee's injury can be connected with his employment is by statement of the obvious fact that if Charles F. Keil, Jr. had not been employed by Contractors Pacific Naval Air Bases for service in Hawaii, he would not have left Denver and consequently would not have been at Seventh and Franklin Streets, Oakland, at the time of the accident. This circumstance or condition alone, however, [16] does not create legal liability:

> In answer to the suggestion that the employee would not have been injured if he had not been at the place of employment, it has been said that in the same causative sense, if he had not come into being he could not have been injured, and that the same argument might be made for a claim against one who sold a carriage to one who was struck by lightning while riding in it."
>
> Mobile & O. R. Co. v. Industrial Commission, 28 Fed. (2d) 228, 231.

To the same effect:

> Storm v. Ind. Acc. Com., 191 Cal. 4, 6, 7, 214 Pac. 874.

In addition to the authorities heretofore cited, the following are a few in point herein:

> Torrey v. Ind. Acc. Com., 191 Cal. 303. (Traveling Inspector drowned while taking boat ride for his own pleasure.)

Morgan v. Hoage, 72 Fed. (2d) 727. As to what is "course of employment".

Gompert v. London Acc. Guar. Co., 100 Fed. (2d) 352. Mechanic employed by mail chute company injured by automobile in street while returning to his hotel after dinner for purpose of installing mail chute.

And for many more pertinent cases and detailed discussion of the questions involved herein see:

Mobile and O. R. Co. v. Ind. Com. 28 Fed. (2d) 228, quoted in part, supra).

Campbell on Workmen's Compensation, Vol. 1, pp. 103-113. [17]

Inasmuch as it does not apepar from the evidence herein that respondent Keil's injuries were suffered while he was acting within the scope of his employment, or that said injuries arose from the employment, or that they were industrial injuries at all within the meaning of the law, it is respectfully submitted that the award should be annulled.

Dated, San Francisco, October 9, 1942.

THEODORE HALE
CHARLES B. MORRIS
CARROLL B. CRAWFORD
Attorneys for Respondents.

[Endorsed] Filed Oct 10 1942. [18]

[Title of District Court and Cause.]

EXCEPTIONS OF RESPONDENT WARREN H. PILLSBURY TO LIBEL IN PERSONAM TO ENJOIN COMPENSATION ORDER

Now comes Respondent Warren H. Pillsbury and, treating the pleading filed herein entitled "Bill of Complaint for Mandatory Injunction" as a libel in personam to enjoin Respondent's Compensation Order, files his exceptions to said libel, and for grounds thereof, alleges:

I.

That the libel on file herein be dismissed for want of allegations showing that libelants are entitled to the relief prayed for. [19]

II.

That the libel on file herein be dismissed in that

(1) It does not appear from the face of said libel in what manner the Findings of Fact heretofore made by Respondent Pillsbury on September 10, 1941, are not supported by substantial evidence;

(2) It does not appear from the face of said libel in what manner the Compensation Award made by Respondent Pillsbury on September 10, 1941, is not supported by substantial evidence;

(3) It does not appear from the face of said libel in what manner the Compensation Award made by Respondent Pillsbury on September 10, 1941, is contrary to law.

Wherefore, Respondent Pillsbury prays that his

exceptions to said libel be granted and that said libel be dismissed and for such other relief that he may be entitled to receive in the premises.

FRANK J. HENNESSY,
United States Attorney.

(Admission of Service.) [20]

[Title of District Court and Cause.]

MEMORANDUM OF AUTHORITIES IN SUPPORT OF EXCEPTIONS

The Findings of Fact and Order directing libelants to pay certain money for workmen's compensation of Respondent Charles Keil, as made by respondent Warren H. Pillsbury in the above entitled matter are final and conclusive and not subject to judicial review if supported by substantial evidence.

Pac. Employers Insurance Co. v. Pillsbury; (CCA-9) 61 F. (2) 101

[Endorsed]: Filed Jan. 4, 1943. [21]

[Title of District Court and Cause.]

OPENING MEMORANDUM OF POINTS AND AUTHORITIES ON SUBMISSION OF CAUSE FOLLOWING LIBEL FOR MANDATORY INJUNCTION

STATEMENT OF FACTS

* * * * * * *

VI.

THE DEPUTY COMMISSIONER WAS WITHOUT JURISDICTION OF THE SUBJECT MATTER HEREIN

Libelants contend that for two reasons the Deputy Commissioner was without jurisdiction to make the findings and award herein:

1. As previously set forth herein, the injury was not compensable because it did not arise out of or in the course of the employment. Only injuries so arising are compensable under the Act. (Sec. 2, subd. 2.) The award was therefore in excess of the Deputy Commissioner's powers. [22]

2. Neither the Longshoremen's and Harbor Workers' Compensation Act nor the Act of August 16, 1941 (Public Law 208, 77th Congress, Chapter 357) amendatory thereof, purport to give the United States Employees' Compensation Commission jurisdiction to award compensation to an employee hired under a contract of employment executed in California, for injuries arising from an accident occurring on the public streets of the City of Oakland or elsewhere within the borders of the State of

California, the navigable waters of the United States and dry docks within the state excepted. The Longshoremen's Act, by its own terms in Sec. 3 (a) expressly denies the Commission such jurisdiction:

> "Sec. 3 (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by state law. * *" (Emphasis ours.)

Obviously the streets of Oakland are not navigable waters of the United States, nor are they a dry dock. The Deputy Commissioner found that at the time of the injury "claimant resided at a hotel in Oakland, adjacent to said office of the employer at Alameda, awaiting transportation." (Libelant's Exhibit No. 2, page 24.) Under such circumstances as to residence of employer and employee the workmen's compensation laws of the State of California apply. (Constitution of California, Article XX, Sec. 21; Labor Code of California, Secs. 3201 to 6002, inclusive, and particularly Secs. 3351, 3600 and 3601.) [23]

As to the Act of August 16, 1941, its operation is specifically limited to employees at military, air and naval bases acquired by the United States from foreign countries, lands occupied or used by the United States for military or naval purposes out-

side the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone.

The title and first paragraph of the Act of August 16, 1941, read:

"(Public Law 208—77th Congress)
(Chapter 357—1st Session)
(S 1642)

AN ACT

To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act', approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government

or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including, Alaska, Guantanamo, and the Philippine Islands, [24] but excluding the Canal Zone, irrespective of the place where the injury or death occurs."

From the foregoing it will clearly be seen that the Act of August 16, 1941 (Public Law 208—77th Congress) applies only to the Territories and other lands over which the Federal Government has exclusive jurisdiction and control and in which no state government has ever been established. In other words, the sovereign states of the Union are excepted from its operation, as indeed they must be in order to save its constitutionality. In this connection it should be remembered that when he was injured Mr. Keil had not passed outside the continental limits of the United States and had never worked at a naval or military base.

It thus appearing that the Compensation Order and Award of Compensation is contrary to the evidence and contrary to law, it is respectfully submitted that it should be reversed and annulled.

Dated, February 4, 1943.

THEODORE HALE,
CHARLES B. MORRIS,
CARROLL B. CRAWFORD,
Attorneys for Libelants.

Receipt of the foregoing Opening Memorandum of Points and Authorities on Submission of Cause

Following Libel for Mandatory Injunction is hereby admitted this 4th day of February, 1943.

FRANK J. HENNESSY,
Per T. S.
Attorney for Respondents.

[Endorsed]: Filed Feb. 4, 1943. [25]

[Title of District Court and Cause.]

SUPPLEMENTAL MEMORANDUM OF RESPONDENT WARREN H. PILLSBURY, DEPUTY COMMISSIONER

The libelant raises for the first time in its briefs the question of the jurisdiction of the Deputy Commissioner of the United States Employee's Compensation Commission to hear and determine the instant case.

While this point should have been raised in the libel we assume that the question of jurisdiction may be raised at any time and, therefore, we take this opportunity to answer the contention briefly.

The provisions of the Longshoremen's and Harbor Workers Compensation Act (Title 33 USC 901 et seq) were [26] extended by an Act of Congress dated August 16, 1941 to employees engaged in employment at military bases outside the continental United States. (Title 42 USC 1651 et seq.)

It is the contention of the respondent Deputy Commissioner that under said Section it is not necessary in order to acquire jurisdiction that the

injury occur outside of the continental United States.

It is sufficient that the person injured be an employee engaged to work at a military post outside of the United States; that the phrase "employee engaged in any employment at" defines the contractual status of the claimant in the sense that he has entered into a contract to work at a military post as defined in the statute.

We adopt this position because of the clause in the statute which states that compensation shall be payable "irrespective of the place where the death or injury occurred." From this we conclude that it is the clear intendment of the statute to protect the employee while traveling to and from his place of employment where we may assume that a greater part of the risks involved will be encountered.

To assume libelant's interpretation of the statute would make the phrase "irrespective of the place where the injury or death occurs" meaningless and we are bound to interpret a statute, wherever possible, so that it is intelligible.

For the reasons stated we respectfully submit that the Deputy Commissioner in the instant case had jurisdiction to make the award. Whether or not his award for an injury occurring during the "waiting period" before the employee [27] left for

his place of employment is fully considered in the briefs on file.

Respectfully submitted,
FRANK J. HENNESSY,
United States Attorney.
Attorney for Respondent
Warren H. Pillsbury.

[Endorsed]: Filed Mar. 29, 1943. [28]

[Title of District Court and Cause.]

ORDER SETTING ASIDE AWARD AND FOR ISSUANCE OF INJUNCTION

Ordered:

1. The Compensation Order, Award of Compensation, Case No. BA-89, Claim No. DB/22, made by Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District, on the 10th day of September, 1942, is set aside:

2. Injunction will be issued as prayed for.

Attorneys for libellants may submit formal order accordingly.

Dated: March 30, 1943.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Mar. 30, 1943. [29]

In the Southern Division of the United States District Court for the Northern District of California

No. 23725-S

LIBERTY MUTUAL INSURANCE COMPANY, a mutual insurance company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and CHARLES F. KEIL, JR.,

Respondents.

ORDER AND DECREE

This cause came on regularly for hearing on the 25th day of January, 1943, on libelants' bill of complaint for mandatory injunction and exceptions to same of respondent Warren H. Pillsbury as Deputy Commissioner of the United States Employees' Compensation for the Thirteenth Compensation District, whereupon the matter was argued by the counsel for libelants and the respondent Deputy Commissioner and was by the Court ordered submitted after the filing of briefs; said briefs having been filed and considered by the Court, and the Court being fully advised herein, and having on the 30th day of March, 1943, made and filed its order setting

[30] aside award and for issuance of mandatory injunction;

It Is Hereby Ordered, Adjudged and Decreed that the Compensation Order, Award of Compensation, in favor of Charles F. Keil, Jr., Case No. BA-89, Claim No. DB/22, made and filed by the said respondent Warren H. Pillsbury as Deputy Commissioner of the United States Employees' Compensation Commission, Thirteenth Compensation District, on the 10th day of September, 1942, should be and it is hereby annulled, vacated and set aside;

It Is Hereby Further Ordered, Adjudged and Decreed that the said Warren H. Pillsbury, as said Deputy Commissioner, and the said Charles F. Keil, Jr., be and they are hereby perpetually enjoined and restrained from taking any further action or proceedings having for their purpose or object the prosecution or enforcement of said cause designated in the files of the United States Employees' Compensation Commission as Case No. BA-89, Claim No. DB/22.

Dated at San Francisco, California, this 15th day of April, 1943.

A. F. ST. SURE,
District Judge.

Receipt of copy of the within Order and Decree is hereby acknowledged this 5th day of April, 1943.

FRANK J. HENNESSY,
Attorney for Respondent
Deputy Commissioner.

[Endorsed]: Filed Apr. 15, 1943. [31]

United States Employees' Compensation Commission

13th Compensation District

In the matter of the claim for compensation under the Act of Congress of August 16, 1941, extending the Longshoremen's and Harbor Workers' Compensation Act to employments on certain military, air, or naval bases of the United States.

CHARLES F. KEIL, JR.,

Claimant,

Against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer.

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION CASE No. BA-89—CLAIM No. DB 22

Claim for compensation having been filed herein under the Act of Congress of August 16, 1941 for injury occurring in the course of an employment on an air, military or naval base of the United States outside the continental United States, in the Pacific Compensation District, and said claim having been transferred to the undersigned Deputy Commissioner, Thirteenth Compensation District, by the Deputy Commissioner of said Pacific District

at Honolulu, in the Territory of Hawaii, with the approval of the United States Employees' Compensation Commission, and such investigation in respect to the above entitled claim having been made as is considered necessary and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

FINDINGS OF FACT

That on the 24th day of May, 1942, the claimant above named was in the employ of the employer for service to be performed at a construction job on an air, military or naval base of the United States on Islands in the Pacific Ocean and in the Pacific Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act as extended by said Act of Congress of August 16, 1941, and that the liability of the employer for [32] compensation under said Acts was insured by Liberty Mutual Insurance Company;

That the said employee was hired for such work at Denver, Colorado, and provided his transportation by the employer to San Francisco Bay. He was directed to report to the employer's office at Alameda, California, on May 14th, at which time his contract for employment was re-executed in fuller form, but to the same effect, his salary commenced the same day. That his contract of employment provided that transportation by ship should thereafter be provided him by the employer to the Pacific Island to which he would be sent for work, but transportation by vessel was not ready for him

on that day. It was contemplated that he would leave San Francisco on the next ship about May 21st, but at that time only three men were taken from the group then awaiting transportation, not including claimant. Accommodations were finally available for the remainder of said men, including claimant, about two weeks later. In the meantime claimant resided at a hotel in Oakland, California, adjacent to said office of the employer at Alameda, awaiting transportation. On the evening of May 24th, after dinner, and while strolling about the City of Oakland, and not on any diversion from his route to his place of employment under said contract, he was struck by an automobile on a public street, sustaining a fracture of the left leg. That under the circumstances stated above, said injury occurred in the course of and arose out of his employment.

That notice of injury was given within thirty days after the date of such injury, to the Deputy Commissioner and to the employer;

That defendants have not provided medical, surgical or hospital treatment. That such treatment was provided at the County Hospital of the County of Alameda, State of California. That claimant is entitled to have paid to him or on his behalf such reasonable charge for such service as may be made against him by said Alameda County Hospital; [33]

That the average annual earnings of the claimant herein at the time of his injury exceeded the maximum provided by said Acts of $1950.00, his actual

wages being $40.00 a week, together with an allowance of $10.50 a week for room and board;

That as a result of the injury sustained the claimant was wholly disabled from the date thereof indefinitely. That he is entitled to 11-2/7 weeks compensations, $25.00 a week, for such disability, to the date of the hearing, August 11, 1942, amounting to $282.14, and thereafter at said rate until the termination of the disability or the further order of the Deputy Commissioner.

Upon the foregoing facts the Deputy Commissioner makes the following:

AWARD

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to claimant compensation as follows: The sum of $282.14 forthwith as of August 11, 1942, and the further sum to claimant of $25.00 a week thereafter, payable in installments each two weeks until the termination of his disability or the further order of the Deputy Commissioner.

Given under my hand at San Francisco, California, this 10th day of September, 1942.

(S) WARREN H. PILLSBURY,
Deputy Commissioner, 13th Compensation District.

WHP-EB:ca.

[Endorsed]: Filed Sept. 10, 1942. [34]

PROOF OF SERVICE

I hereby certify that a copy of the foregoing Compensation Order-Aware of Compensation, was sent by registered mail to the claimant, to the employer, and to the insurance carrier at the last known address of each as follows:

Mr. Charles Keil, Jr., c/o Hotel Royal, 20th and San Pablo, Oakland, California.

Contractors, Pacific Naval Air Bases, Drawer F, Alameda, California.

Liberty Mutual Insurance Company, 703 Market Street, San Francisco, Calif.

By regular mail to:

Mr. C. B. Morris, Attorney, 220 Bush Street, San Francisco, Calif.

Mr. Andrew F. Schmitz, Deputy Commissioner, 407 Hawaiian Trust Bldg., Honolulu, T. H.

Mr. E. V. Parker, United States Employees' Compensation Commission, 285 Madison Avenue, New York, New York.

WARREN H. PILLSBURY,
Deputy Commissioner.

Mailed 9-10-42
CA

[Endorsed]: Filed Jun. 19, 1943. [35]

Form 48

CONTRACT OF EMPLOYMENT

Req. No. 1057 Ex A
Project Barber's Pt.

Contractors, Pacific Naval Air Bases - - Contracts NOy-3550 and NOy-4173 the "Employer", employs the "Employee" hereinafter named upon the following terms and conditions, to which the Employer and the Employee agree:

1. Name of Employee: Charles Frederick Keil, Jr.

2. The position for which the Employee represents he is qualified and for which he is engaged is that of Steamfittter's Helper on a construction job on Pacific Islands. It is understood that although the Employee is engaged for the above mentioned class of work, he may be used, at the option of the Employer, in any other class of work, without any reduction in pay.

3. The period of service shall be such period as the Employer may desire the services of the Employee, it being understood that the Employee may be transferred from one job and location to another if desired by the Employer, but the Employer will not require the Employee to remain on the Pacific Islands more than twelve months without his consent. The Employee agrees to work for the Employer in accordance with the terms of this contract until the termination of the period of service. In the event that the Employee shall refuse or fail to

work for the Employer as herein provided, or shall otherwise fail or be unable fully to perform this contract for whatever reason, including actions or orders of military or civil authorities or of the enemy, the Employer shall be excused from any performance on its part while such default of the Employee shall continue, and may at its option terminate this contract.

4. Salary or wages shall be No Dollar(s) and eighty (80) cents per hour, based on a 44-hour week basis with the guaranteed opportunity to work 48 hours per week, or No Dollar(s) and eighty-five (85) cents per hour, based on a 48-hour week basis, plus board and lodging or, in lieu thereof, $10.50 per week at the Contractors' option only, and shall be the whole salary and compensation applicable for the entire period of service.

5. The Employee agrees to work a minimum of 48 hours per week. Any work in excess of 8 hours per day or in excess of the stipulated work week will be paid for at the rate of one and one-half times the base rate. Saturday and Sunday, as such, shall not be considered as an overtime day.

6. Salary to commence on May 14, 1942, and cease on return to original Port of Embarkation or prior termination of contract, except as provided in Paragraphs 8 and 9. (Salary is not payable for travel time to Port of Embarkation, or for any period prior to date stated

above, or for any period after return to Port of Embarkation. The Employer reserves the right to withhold all or any portion of the salary covering traveling time from Port of Embarkation for a period of sixty days after the Employee arrives at Honolulu.)

7. Transportation from San Francisco to Honolulu, T. H., and, upon satisfactory completion of contract, return to Port of Embarkation, and all incidental preliminary expenses, such as medical examination, vaccinations and photographs will be paid by the Employer. (Transportation cost to Port of Embarkation will be paid only if authorized in writing in advance. No transportation will be paid after return to Port of Embarkation.)

8. It is understood that the Employee will arrange and pay his return transportation cost and expenses if he quits, or if he is discharged in accordance with Paragraph 9. In either case, salary shall cease as of the date of quitting or discharge.

9. If the services of the Employee are not satisfactory to the Employer, or if he is not, or does not show himself, qualified for the position for which he is hired, or is negligent in his duties, or displays bad temper, or in the case of the immoderate use, in the opinion of the Employer, of alcoholic drinks, or the contraction or development of venereal disease, the Employee may be discharged without any further

obligation resting upon the Employer. It is understood that the Employee may be dismissed if requested by any Government Official. Immediately upon such discharge or dismissal, the employment shall terminate and salary shall cease; and the Employee will arrange and pay his own return transportation cost and expense.

10. The Employee, before departure, is to submit to the required physical examination, furnish in duplicate certificates of the examining physician (a satisfactory medical certificate being a condition of this employment), and submit to and furnish certification of the required vaccination.

11. The Employee understands that other men from his trade, or other trades or crafts, may be employed on the work to be done in the Pacific Islands, and that these men may be either union or non-union. The Employee agrees that the employment of such men will not be used as a reason for failure to carry out this contract.

12. Compensation insurance will be paid in accordance with the Defense Base extension of the Longshoremen's and Harbor Workers' Compensation Act.

13. While traveling on vessels on pay status, employees may be required to perform those services necessary for their own upkeep aboard such vessel, including serving food at mealtimes,

maintaining the proper condition of cleanliness in quarters, and other necessary duties brought on by the presence of civilians on such vessels.

14. The Employee understands that the Territory of Hawaii is under the supervision of military authorities acting pursuant to martial law and/or the supervision of civil authorities acting pursuant to emergency and extraordinary powers. The Employee agrees that any act by the Employer inconsistent with the provisions hereof and any omission by the Employer to perform any of its obligations hereunder shall be excused if such act or omission shall result from the compliance by the Employer with any order or regulation of the said military or civil authorities, and the period of employment shall not be extended as a result of the interruption of the performance hereof by reason of such order or regulation.

15. The Employee agrees that no promises whatso ever other than those stated in this contract have been made.

In the event of accident or emergency the Employer may notify:
Mr. Chas. R. Keil, Relationship Father, at 3548 Columbine (Street or R.F.D. Number), Denver (City), Colorado (State).

The foregoing address may be considered as the Employee's permanent address or the address of the person in whose care the Employer may communicate concerning this contract or other

matters if it is unable to communicate with the Employee personally.

Nearest of Kin same as above.

Executed at Alameda, California, in quintuplicate, this day of May 14, 1942.

Signed and acknowledged in presence of:

(sgd) G. R. HUGHS,
As to the Employer.

(sgd) G. R. HUGHS,
As to the Employee.

CONTRACTORS PACIFIC NAVAL AIR BASES, CONTRACTS NOy-3550 and NOy-4173.

By (sgd) W. H. WALTHALL,
Employer.

(sgd) CHARLES FREDERICK KEIL, JR.,
Employee.

[Endorsed]: Filed Jun. 19, 1943. [36]

[Title of District Court and Cause.]

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before Warren H. Pillsbury, Deputy Commissioner, United States Employees' Compensation Commission, at the offices of the Commission, at Four Seventeen Market Street, San Francisco, California, on Tuesday the 11th day of August, 1942, at 2:00 P. M.

Appearances:

Claimant present in person.

Defendant represented by C. B. Morris, Attorney, and C. L. Brash of the Alameda Base of Contractors PNAB.

Anita Smith, (Substituting for Mildred McColgan,) Reporter.

Mr. Pillsbury: Hearing on claim for compensation. The claim, supplemented by claimant's statement, alleges that the injury, though occurring at Oakland, California, was in employment in reference to service to be rendered at a military base of the United States on the Island of Oahu, Territory of Hawaii. The case is primarily within the jurisdiction of Deputy Commissioner Andrew F. Schmitz, Pacific District, Honolulu. It, however, has been transferred by Deputy Commissioner Schmitz to me for hearing and decision in the 13th Compensation District, with the approval of the Employees' Compensation Commission, because of claimant's residence in this district, and apparently because of witnesses being in this district also.

The claim originates under Act of Congress of August 16, 1941, extending the provisions of the Federal Longshoremen's and Harbor Workers' Compensation Act to employments on air, military and naval bases of the United [37] States outside the Continental United States.

The claim indicates that compensation is contended to be due because of an automobile acci-

dent at Oakland, California, sustained while claimant was under contract with defendants to proceed to the Hawaiian Islands for service as above.

Mr. Morris, what are defendants' contentions?

Mr. Morris: Our contentions are that he was not in the course of his employment; that he had not arrived at the point of employment and that the accident occurred in the evening, at a time when there were no services being rendered to the employer.

The Following Facts Are Agreed to by the Parties:

1. That on and about May 24, 1942 claimant was under an existing contract of employment with defendant Contractor Pacific Naval Air Bases, and that at said time said employer had secured the payment of compensation under said Military Bases Act by insurance in defendant Liberty Mutual Insurance Company.

2. That the contract was for the performance of service at an air, military or naval base of the United States outside the Continental United States, and the claim is within the provisions of said Military Bases Act and the jurisdiction of the appropriate Deputy Commissioner.

3. That claimant met with accidental injury on May 24, 1942, the injury being due to his being hit by an automobile at Seventh and Franklin Streets, Oakland, California, and causing a fracture of the left leg.

4. No claim is made of intoxication contributing to said injury, or of wilfully self-inflicted injury.

5. That medical treatment has not been furnished

by defendants. Claimant has received care to date at the Alameda County Hospital. If the injury is found to be compensable and if the Alameda County Hospital makes a charge [38] for such treatment, award may be entered in favor of claimant against defendants for the payment of the reasonable medical expenses incurred.

6. Notice of injury within 30 days admitted.

7. That the earnings provided for by said contract of employment may be taken for the purpose of this proceeding at $40.00 a week plus board and room of the reasonable value of $10.50 a week, subject to the provisions concerning the maximum compensation rate contained in said Act.

8. That no compensation has been paid.

9. That claimant has been totally disabled from from labor from the time of his accident to the present time, and will be totally disabled from labor as a result thereof for a period of time in the future not here determined.

The only Issue is whether such injury occurred in the course of and arose out of claimant's employment.

Are you satisfied this is a correct copy of your contract, Mr. Keil?

Mr. Keil: Yes.

Mr. Pillsbury: Mr. Morris offers copy of contract of employment, dated May 14, 1942, which claimant stipulates to be correct, ond it is received in evidence as Exhibit "A".

CHARLES KEIL, JR.,

the claimant, being first duly sworn, testified as follows:

Mr. Pillsbury: Q. Your name is Charles Keil, Jr.? A. Yes, sir.

Q. Your present address is Hotel Royal, Oakland, California? A. Yes, sir.

Q. Where is your home, Mr. Keil?

A. Denver, Colorado.

Q. And what is the address?

A. 3548 Columbine Avenue. [39]

Q. Are you planning to return to Denver as soon as you can?

A. Well, not necessarily, no. It depends on how the outcome of things are. If I am able to secure employment here, I may do that.

Q. So far as this case is concerned, there would be no reason until I tell you to the contrary at the close of the hearing, for your staying here for the purpose of the case after today.

Now, according to this printed contract, Exhibit "A", the contract of employment was signed May 14, 1942, at Alameda, California. That is correct, is it? A. Yes, sir.

Q. Was there any earlier or preliminary contract?

A. Not what I would call a contract, other than papers we signed at Denver, Colorado, previous to that, which would—whether you would call it a preliminary contract or not I couldn't say,—had the necessary papers, birth certificate and the like.

(Testimony of Charles Keil, Jr.)

Q. Did you sign any definite agreement to work for the Pacific Naval Air Bases while you were in Colorado?

A. Yes, there is a paper there.

Q. Now, this contract, Exhibit "A", provides that your salary was to commence on May 14, 1942?

A. Yes, sir.

Q. And did it commence on May 14th?

A. Yes.

Q. You were under salary at the time of your accident? A. Yes, sir.

Q. Now, why weren't you on your way to Honolulu by May 24th?

A. Due to—one boat sailed on a Thursday previous to that. [40]

Q. Previous to the 14th?

A. No. Previous to the accident of the 24th, which would make it about the 21st the boat sailed. We were called for sailing that day, and only three of the crew I was with was taken, who were underground workers. The rest of us were delayed to a later sailing.

Q. Were you originally to have sailed on or about the 14th of May?

A. That was the opinion we had at the time, but only three were taken.

Q. That was on the 14th?

A. No. That was the 21st.

Q. I am speaking now of the date your contract was signed.

A. Our agreement when we came out here was

(Testimony of Charles Keil, Jr.)

we should figure on a possible week layover, and the notice we had after signing the contract was to report at the Naval Air Base on a Thursday, which would be the 21st of May.

Q. How did you happen to be out here on the 14th of May?

A. Our bus left—they furnished our transportation from Denver, and the bus left on the 12th of May, which brought us in here on the 14th.

Q. Was that transportation provided for you by the Pacific Naval Air Base? A. Yes, sir.

Q. Then the employer arranged it for you to be here on the 14th of May? A. Yes, sir.

Q. At the time your contract was signed?

A. That's right.

Q. And did they have a boat ready for you to sail on at that time? A. Not at that time, no.

[41]

Q. You anticipated that they would have transportation by water ready for you on May 21st?

A. That was—we were called out to have our luggage all checked and be out there on the 21st, at which time the underground workers were taken, and only three of our crew was taken, leaving the rest of us.

Q. So the company did not have a boat ready for you on the 21st? A. No, sir.

Q. What were you told about further sailing?

A. We were just told to return to our hotels and wait until further notice of sailing.

(Testimony of Charles Keil, Jr.)

Q. And had you received any notice by the 24th of May?

A. Not to any definite time of sailing, no.

Q. And do you know when the other members of your crew with whom you were waiting, were actually shipped?

A. They finally left two weeks—to my recollection, two weeks after I had my accident.

Q. You had not missed any boat, or failed to appear up to the 24th at any time you were directed to appear for sailing? A. No, sir.

Q. Now, how did you get hurt, Mr. Keil?

A. Well, crossing the street at Seventh and Franklin Streets, going across the cross-walk, I took notice of the traffic coming, both right and left. There was cars coming from the left at a considerable distance away, which I had plenty of time to cross before them, and after getting to the middle of the street, I turned to the right, at which time a car apparently come from around on the other side, on the left-hand side of the road, and struck me on the left-hand side of the road. [42]

Q. At what time was this?

A. It happened about 8:30 in the evening.

Q. What were you doing at Seventh and Franklin Streets at that time?

A. Just out walking—we had been. Another fellow by the name of Mr. Olson and I had taken a walk. We had been to Lake Merritt from the Hotel and then back up town and walking around just killing time, more or less. We had had sup-

(Testimony of Charles Keil, Jr.)

per about 6 o'clock and been out walking since then.

Mr. Pillsbury: Mr. Morris, any questions?

Mr. Morris: Q. Mr. Olson—is he down—has he sailed? A. Yes, he has sailed.

Q. Where did you have your supper that night?

A. At the Acme Grille, on San Pablo.

Q. That's over on the other side of town from where you were hurt?

A. Yes. It is about, I should judge—about 16th and San Pablo—about 15th or 16th and San Pablo.

Q. You had your dinner there and then you took a walk? A. Yes, sir.

Mr. Pillsbury: Q. Were you looking for anything in the region of 7th and Franklin?

A. No. Everybody has asked me that, but not knowing the town—we weren't acquainted and naturally liable to wind up most any point in town in the course of walking.

Q. That is, you were not on any particular expedition to any particular place at the time?

A. No, sir.

Mr. Morris: Q. Were you going back towards your hotel, or away from the hotel?

A. No. We were coming toward the hotel at the time the accident happened. [43]

Q. You had been down along the water front?

A. Yes. We just looked across the street toward what they call the fishermen's dock there. We did not cross the street there, just turned around and

(Testimony of Charles Keil, Jr.)
started back toward the hotel. There didn't look to be anything of interest.

Q. This car came from in back of some other cars, you didn't see it?

A. I never saw it at all, never saw the car. Mr. Olson was on my left, had the advantage over me. He saw it and jumped in time to avoid his only being clipped on the heel, which didn't hurt him at all.

Q. You were paying for your own meals and hotel? A. Yes.

Q. Paying that out of your salary?

A. Yes, sir.

Mr. Pillsbury: Q. That is, your subsistence did not start until you reached the Islands?

A. Until we boarded the boat.

Mr. Morris: That is all.

Mr. Pillsbury: Hearing closed.

I hereby certify that the foregoing is a correct transcript of the testimony and proceedings taken in the above matter at the hearing held on August 11, 1942.

.....

Reporter.
(Substituting for Mildred McColgan)

[Endorsed]: Filed Jun 19 1943. [44]

U. S. Naval Communication Service

SRS

Copy

NPM 495 ER6th
ZPNI RDO Honolulu CK 25 Govt COMP Sixth 2047
Govt Comp Pillsbury Deputy Commissioner Comp 417 Market Street San Francisco
Reurad Charles Keil Have Wired Commission Recommending Transfer to You No Information Available Honolulu:—

SCHMITZ

2233

LD 3193

[Endorsed]: Filed Jun 19 1943. [45]

U. S. Naval Communication Service

SRS

NSS NR 2087 SA 7 AUG Copy
ZPNi RDO New York 29 Govt Compen 7 1616
Govt Compen Pillsbury Compen Sanfran
Claim Henry Burt Transferred to You for Hearing and Decision Also Claim Charles Keil Jr Schmitz Wires No Information Available Honolulu For Keil

Compen

1802 03658

LD.....

[Endorsed]: Filed Jun 19 1943. [46]

(Copy)

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Case No. BA
Insurance
Carrier's No. .....

United States Employees' Compensation Commission

Office of Deputy Commissioner Warren H. Pillsbury

Administering Longshoremen's and Harbor Workers' Compensation Act
Employee's Claim for Compensation

(To be filed with the Deputy Commissioner in accordance with sections 13 and 19 of the law)

Injured Person

1. Name of employee—Charles Keil, Jr. Employee's check No.....
2. Address: Street and No.—Hotel Royal, City or town—Oakland, California
3. Sex—Male Age—30 Married, s i n g l e, widowed—single
4. Do you speak English? — Yes Nationality—American
5. State regular occupation — Steam Fitter's Helper
6. What were you doing when injured?— " "

Mo

7. (a) Wages or average earnings perxxy, $165. & Subsistence (Including overtime, board, rent, and other allowances.) (b) Per week, $..... (c) Were you employed elsewhere during week in which you were injured?..... (d) If so, state where and when.....

8. Were you paid full wages for day of accident?

Employer

9. Employer—Contractors, Pacific Naval Bases

10. Office address: Street and No..... City or town—Alameda, Calif.

11. Nature of business .....

The Injury

12. Place where injury occurred—Seventh and Franklin Streets, Oakland, Calif. (Give place and name of vessel)

13. Name of foreman .....

14. Date of accident or first illness, the 24th day of May, 1942, at.....o'clock.....M.

15. How did accident happen or how was occupational disease caused?—After signing of preliminary employment contracto at Denver, Colo., and final contract at Alameda, Californ sailing was postponed to later boat. Struck by auto Sunday evening, May 24th, while down town.

Nature and Extent of Injury

16. State fully nature of injury or occupational disease:—Fracture of left leg

17. On what date did you stop work because of injury? ....., 192.....

18. Have you returned to work? (Yes or No.) No
If "yes," on what date?....., 192.....

19. Does injury keep you from work? (Yes or No.) Yes

20. Have you done any work in period of disability?—No

21. Have you received any wages since injury?....
If so, from and to what date? .....

22. Has injury resulted in amputation? .....
If so, describe same .....

23. Did you request your employer to provide medical attendance?.....Has he done so?.....

24. Attending physician: Name.....
Address .....

25. Hospital: Name—Highland Hospital
Address—Oakland, Calif.

Notice

26. Have you given your employer notice of injury? (Yes or No.)—Yes When?....., 192....

27. If such notice was given, to whom?.....

28. Was it given orally or in writing?.....

I hereby present my claim to the Deputy Com-

missioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

Signed by
(S) CHARLES F. KEIL, JR.
Claimant
Mail address
Hotel, Royal, Oakland, Calif.

Dated August 5, 1942, 192

[Endorsed]: Filed Jun 19 1943. [47]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

In this libel to review an order and award of compensation made by Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, under the Longshoremen's and Harbor Workers Compensation Act of 1927, as amended (33 U. S. C. 901 et seq.) and the act of Congress of August 16, 1941 (42 U. S. C. 1651 et seq.) extending the Longshoremen's and Harbor Workers' Act to certain workers on naval and military bases outside the continental United States, the court finds:

1. That this court has jurisdiction to review the said award under the terms of the aforementioned acts.

2. That about May 12, 1942, at Denver, Colorado, the respondent Charles F. Keil, Jr., signed a preliminary contract of employment with Contractors Pacific Naval Air Bases on a military or naval base project in the Hawaiian Islands; that he arrived in Oakland, California, on May 14, 1942, where he signed a final contract of employment, which was the only contract put in evidence at the hearing before the Deputy Commissioner.

3. That the respondent Charles F. Keil, Jr. had expected to sail by ship for the Hawaiian Islands on May 21, 1942, but only three of his party were taken aboard; respondent Keil returned to his hotel in Oakland to await the sailing of the next ship; during this waiting period he was under pay from his employer, but was not to receive his board until he embarked for the Hawaiian Islands.

4. That, on Sunday, May 24, 1942, at about 8:30 in the [48] evening, while returning to his hotel after a stroll about the City of Oakland, State of California, with a companion, respondent Keil was struck by an automobile at Seventh and Franklin streets in said city and suffered a broken leg.

5. That thereafter, and within the time allowed by law, respondent Keil filed a claim for comensation under the aforesaid acts with respondent Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission; that said claim was numbered No. BA-89, Claim No. DB/22 in the files of said commission.

6. That, on the 11th day of August, 1942, the said matter was heard before the said Deputy Com-

missioner at this office in San Francisco; the material issues at such hearing were (1)) whether claimant's said injuries were suffered while he was in the scope of his employment, and (2) whether said injuries arose from said employment so as to entitle the employee to Workmen's Compensation under the said Longshoremen's and Harbor Workers' Compensation Act as amended by said act of Congress of August 16, 1941, and (3) whether said Deputy Commissioner had jurisdiction to consider the matter and make an award therein; libelants contended that said injuries were suffered when claimant was without the scope of his employment, that they did not arise from said employment and that the Deputy Commissioner was without jurisdiction to make any award whatsoever in said matter.

7. That thereafter, on the 10th day of September, 1942, the said Deputy Commissioner made his compensation order and award of compensation, finding among other things, that "on the evening of May 24, 1942, after dinner, and while strolling about the City of Oakland, and not on any diversion from his route to his place of employment under said contract, he was struck by an automobile on a public street, sustaining a fracture of the left leg. That' under the circumstances stated above, said injury occurred in the course of and [49] arose out of his employment." The award of compensation directed that the employer, Contractors Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, pay to respon-

dent Charles F. Keil, Jr. compensation as follows:

The sum of $282.14 forwith, as of August 11, 1942, and the further sum to claimant of $25 a week thereafter, payable in installments each two weeks, until the termination of his disability or the further order of the Deputy Commissioner.

8. That said Compensation Order and award of Compensation are not in accordance with law or with the provisions of the Longshoremen's and Harbor Workers' Compensation Act as amended, or with the Act of Congress of August 16, 1941, extending the provisions of the said Longshoremen's and Harbor Workers' Compensation Act to employees engaged in employment at military and naval bases outside the continental United States, in this:

There was not before said Deputy Commissioner any evidence proving or tending to prove that the said accidental injuries to respondent Charles F. Keil, Jr. were suffered (1) while said respondent was in the course of his employment, or (2)) that said accidental injuries arose from his employment, or (3) while said Charles F. Keil, Jr. was employed as a worker (other than a member of the crew) on a vessel lying in or plying the navigable waters of the United States (including any dry dock), nor while said respondent was employed at any military, air or naval base acquired by the United States from a foreign country or on land occupied or used by the United States for military or naval purposes outside the continental limits of the United States.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the Court finds:

I.

That this court has jurisdiction under the Longshoremen's [50] and Harbor Workers' Compensation Act of 1927 as amended (33 U. S. C. 901 et seq.) and the Act of Congress of August 16, 1941 (42 U. S. C. 1561 et seq.) to entertain this libel and petition for mandatory injunction permanently restraining enforcement of the said act.

II.

That the said injuries suffered by the said Charles F. Keil, Jr. on the 24th day of May, 1942, were suffered while the said Charles F. Keil, Jr. was not within the scope of his employment; that the said injuries did not arise from the said Charles F. Keil, Jr.'s employment, and the said Deputy Compensation Commissioner in making the aforesaid award acted entirely without and beyond his jurisdiction and that, therefore, said award should be annulled, vacated and set aside, and the said Warren H. Pillsbury, as Deputy Commissioner of the United States Employees' Compensation Commission and the said respondent Charles F. Keil, Jr. should be perpetually enjoined and restrained from taking any further proceedings having for their purpose or object the prosecution or enforcement of said cause.

Let judgment be entered accordingly.

Dated at San Francisco this 12th day of July, 1943, and made nunc pro tunc as of April 14, 1943, which is a date prior to that on which the judgment herein was signed and entered. These Findings of Fact and Conclusions of Law are made at respondents' request for the sole purpose of informing respondents of the court's reasons for annulling the aforesaid order and award of compensation and directing the issuance of a mandatory injunction, in order that said respondents may appeal from the judgment herein if they be so advised.

A. F. ST. SURE,
District Judge. [51]

The foregoing Findings and Conclusions are hereby approved by the respective parties hereto, who further stipulate that they may be signed *be* the court, and when and if so signed shall constitute the Findings of Fact and Conclusions of Law in the above-entitled cause.

Dated: July 6, 1943.

THEODORE HALE,
CHARLES B. MORRIS,
CARROLL B. CRAWFORD,
Attorneys for Libelants.
FRANK J. HENNESSY,
Attorney for Respondent Warren H. Pillsbury, Deputy Commissioner.

[Endorsed]: Filed Jul 22, 1943. [52]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Judge of the District Court of the United States for the Northern District of California.

Warren H. Pillsbury, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers Compensation Act, one of the Respondents in the above entitled matter and appellant herein, feeling agrieved by the Order and Decree made and entered in the above entitled cause on the 30th day of March, 1943, wherein and whereby the Libel of mandatory injunction was sustained, does hereby appeal from said Order and Decree to the United States Circuit Court of Appeals for the Ninth Circuit [53] for the reasons set forth in the Assignment of Errors filed herewith.

Wherefore petitioner prays that his Petition be allowed and that citation be issued as provided by law, and that the transcript of the record, proceedings and documents and all of the papers upon which said Order and Decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit under the rules of such Court and in accordance with the law in such cases made and provided.

Dated: This 23rd day of June, 1943.

FRANK J. HENNESSY,
United States Attorney.

Receipt of a copy of the above Petition for Appeal is hereby acknowledged this day of June, 1943.

....,
Proctor for Libelants.

[Endorsed]: Filed Jun 24, 1943. [54]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

On motion of Frank J. Hennessy, United States Attorney for the Northern District of California, attorney for respondent Warren H. Pillsbury and appellant in the above entitled cause;

It Is Hereby Ordered that the appeal to the United States Circuit Court of Appeals for the Ninth Circuit from an Order and Decree heretofore made in the above entitled case, be and the same is hereby allowed, and that a certified transcript of the records, testimony, exhibits, Stipulations and all proceedings be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit in the manner and time prescribed by law.

Dated: This 24 day of June, 1943.

A. F. ST. SURE,
United States District Judge.

[Endorsed]: Filed Jun 24, 1943. [55]

[Title of District Court and Cause.]

CITATION AND ADMISSION OF SERVICE

The United States of America to the Libelants Liberty Mutual Insurance Company, a Mutual Insurance Company and Contractors Pacific Naval Air Bases, an Association: Greeting:

You Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the Post Office Building in the City and County of San Francisco, State of California, within forty (40) days from date hereof pursuant to a Petition for Appeal in the Clerk's Office of the District Court of the [56] United States for the Northern District of California, Southern Division; wherein Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and Charles F. Keil, Jr. are the respondents-appellants, and Liberty Mutual Insurance Company, a mutual insurance company, and Contractors Pacific Naval Air Bases, an association, are the libelants-appellees, to show cause if any there may be why the Order and Decree in said Petition for Appeal mentioned should not be corrected and speedy justice should not be taken in that behalf.

Given under my hand in the City and County of San Francisco in the District and Circuit aforesaid this 24 day of June, 1943.

A. F. ST. SURE,
United States District Judge.

Receipt of a copy of the within Citation and Admission of Service is hereby acknowledged this day of June, 1943.

....., Proctor for Libelants-Appellees.

[Endorsed]: Filed Jun 24, 1943. [57]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Now comes Warren H. Pillsbury, Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers Compensation Act, one of the respondents in the above entitled cause, by his proctor, and in connection with his Petition for Appeal, assigns the following errors in the Order and Decree of this Court entered March 30, 1943:

I.

That the United States District Court for the Northern District of California erred in making and entering [58] the Order and Decree dated March 30, 1943, sustaining the Libel herein and issuing the mandatory injunction in said Libel;

II.

That the said Court erred in refusing to sustain the Rsepondent Warren H. Pillsbury's Exceptions to the Libel herein, and in refusing to confirm the compensation order and award made by Warren H.

Pillsbury, Deputy Commissioner, filed on September 10, 1942;

III.

That the said Court erred in refusing to enter an order and decree herein declaring that the said compensation order of the Respondent Warren H. Pillsbury was in accordance with law and supported by evidence;

IV.

That said Court erred in refusing to support the findings of Respondent Warren H. Pillsbury, Deputy Commissioner, for the 13th Compensation District under the Longshoremen's and Harbor Workers Act that Charles F. Keil, Jr. was injured in the course of and within the scope of his employment;

V.

That the Court erred in finding that the Respondent Warren H. Pillsbury as said Deputy Commissioner was without [59] jurisdiction to make findings and award of compensation under the Longshoremen's and Harbor Workers Compensation Act.

FRANK J. HENNESSY
United States Attorney
Proctor for Respondents-
Appellant

Receipt of a copy of the within Assignment of Errors is hereby acknowledged this .... day of June, 1943.

.....
Proctor for Libelants-Appellees

[Endorsed]: Filed Jun 24 1943. [60]

[Title of District Court and Cause.]

DESIGNATION OF APOSTLES ON APPEAL

To The Clerk of The Above Entitled Court:

You will please make up, certify and file a transcript of the record in the above entitled cause upon the appeal thereof to the Circuit Court of Appeals for the Ninth Circuit, and incorporate therein the following:

Libel (entitled Bill of Complaint for Mandatory Injunction,) including a Memorandum of Points and Authorities in support thereof and attached thereto;

Exceptions of Respondent Warren H. Pillsbury to the Libel in personam to enjoin compensation order and Memorandum of Points and Authorities attached thereto; [61]

Supplemental Memorandum of Points and Authorities of Respondent Warren H. Pillsbury in support of Exceptions to Libel in personam;

Transcript of testimony taken before Respondent Warren H. Pillsbury and any exceptions annexed thereto and in particular:

Compensation Order and Award of Compensation filed September 10, 1942;

Copy of contract of employment between Contractors Pacific Naval Air Bases and Charles F. Keil, Jr. dated May 14, 1942;

Copy of transcript of testimony before Respondent Warren H. Pillsbury, Deputy Commissioner dated August 11, 1942;

Copy of telegram dated August 6, 1942 from Deputy Commissioner Schmitz to Commission;

Copy of telegram dated August 7, 1942 from Commission to Respondent Warren H. Pillsbury;

Copy of employee's claim for compensation.

Order setting aside award and for issuance of injunction dated March 30, 1943;

Order and Decree;

Findings of Fact and Conclusions of Law;

The following papers filed on or about June ...., 1943:

Petition for Allowance of Appeal;

Order Allowing Appeal;

Citation and Admission of Service and Certificate of Service;

Assignment of Errors;

Designation of Apostles on Appeal;

Clerk's Certificate to Transcript of record.

Dated: This 23rd day of June, 1943.

FRANK J. HENNESSY
United States Attorney
Proctor for Respondents-Appellants.

(Admission of Service.)

[Endorsed]: Filed July 15 1943. [62]

[Title of District Court and Cause.]

CONTRA-DESIGNATION OF APOSTLES ON APPEAL

To the Clerk of the Above Entitled Court:

In addition to the papers enumerated by respondents-appellants in their Designation of Apostles on Appeal on file herein, you will please include in the record on appeal:

(a) That portion of "Opening Memorandum of Points and Authorities on Submission of Cause Following Libel for Mandatory Injunction", filed in this Court on February 4, 1943, which begins on page 12, line 7, with the Roman Numeral "VI", and thence to the bottom of page 12, and all of pages 13, 14 and 15 thereof.

(b) This Contra-Designation of Apostles on [63] Appeal.

Dated: July 23, 1943.

THEODORE HALE
CHARLES B. MORRIS
CARROLL B. CRAWFORD
Proctors for Libellants-Appellees.

Receipt of copy of the within Contra-Designation of Apostles on Appeal is hereby acknowledged this 23rd day of July, 1943.

FRANK J. HENNESSY
Proctor for Respondents-Appellants.

[Endorsed]: Filed Jul 14 1943 [64]

District Court of the United States,
Northern District of California

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify that the foregoing pages, numbered from 1 to 64, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of Mutual Liberty Insurance Co., et al., Libelants, vs. Warren H. Pillsbury, Deputy Commissioner of the United States Employees' Compensation Commission, et al, No. 23725-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of apostles on appeal is the sum of $14.70 and that said sum has been charged against the United States.

In Witness Whereof, I have hereunto set my hand and seal of said District Court at San Francisco, California, this 28th day of July, 1943.

C. W. CALBREATH, Clerk
By E. H. NORMAN,
Deputy Clerk [65]

[Endorsed]: No. 10507. United States Circuit Court of Appeals for the Ninth Circuit. Warren H. Pillsbury, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers Compensation Act, Appellant, vs. Liberty Mutual Insurance Company, a Mutual Insurance Company, and Contractors Pacific Naval Air Bases, an Association, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 28, 1943.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the Circuit Court of Appeals for the Ninth Judicial Circuit of the United States of America

No. 10507

LIBERTY MUTUAL INSURANCE COMPANY, a mutual insurance company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an association,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th District, and CHARLES F. KEIL, JR.,

Respondents.

STATEMENT OF POINTS ON APPEAL AND DESIGNATION OF APOSTLES ON APPEAL.

To the Clerk of the above entitled Court:

Appellant Warren H. Pillsbury hereby adopts and makes a part hereof as if incorporated herein as his statement of points on appeal those specifications, designations and objections presented and stated in his Assignment of Errors on file herein, copy of which has been heretofore served on proctor for libelants.

The appellant Warren H. Pillsbury relies on the entire transcript of record as certified and filed in this court in support of his Points on Appeal.

Dated: This 2nd day of September, 1943.

FRANK J. HENNESSY
United States Attorney
Proctor for Appellants.

[Endorsed]: Filed Sep 3 1943. Paul P. O'Brien, Clerk.

No. 10,507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

FRANK J. HENNESSY,
United States Attorney,
JAMES T. DAVIS,
Assistant United States Attorney,
Post Office Building, San Francisco,
Proctors for Appellant.

WARD E. BOOTE,
Chief Counsel, United States Employees' Compensation Commission,
HERBERT P. MILLER,
Associate Counsel,
Of Counsel.

Subject Index

Table of Authorities Cited

Cases

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No. 10,507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLANT.

JURISDICTIONAL STATEMENT.

This case arises upon a bill of complaint for judicial review of a compensation order, filed pursuant to the provisions of section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; U.S.C., Title 33, Chapt. 18, sec. 901, *et seq.*), as made applicable to persons employed at cer-

tain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42 U.S.C.A., secs. 1651-1654), hereinafter called "Defense Bases Act".

Section 21(b) of the Longshoremen's Act, *supra,* provides as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra,* provides as follows:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

STATEMENT OF CASE.

On May 12, 1942, Charles F. Keil, Jr., at his home in Denver, Colorado, signed a contract with Contractors Pacific Naval Air Bases to work on certain de-

fense bases in the Pacific Ocean and was transported by bus by his employer to San Francisco Bay to await shipment by boat to the place of work (R. 34, 47, 48, 49, 58); upon arrival at San Francisco Bay, on the 14th of May, 1942, a more complete contract of employment was entered into (R. 38), whereby, among other things, it was agreed that the employment status should commence as of May 14th, 1942 (R. 39), and in case of injury compensation would be paid in accordance with the Defense Bases Act (R. 41); there was no boat available on the 14th of May, but it was expected one would be ready on May 21, 1942; on the latter date the boat took only three employees and the remainder, including Keil, were told to return to the hotel and wait until further notice of sailing (R. 49); in the evening of May 24, 1942, Keil and another employee *went out to supper* and on the way back to the hotel Keil was struck by an automobile, which severely injured him (R. 50, 51); Keil filed claim for compensation, and the *only issue* raised by the employer and insurance carrier at the hearing before the deputy commissioner was "whether such injury occurred in the course of and arose out of claimant's employment". (R. 46.)

Upon the evidence adduced at the hearings before him the deputy commissioner filed the compensation order of September 10, 1942, complained of, in which he found that the injury arose out of and in the course of the employment. (The compensation order containing the complete findings of fact of the deputy commissioner is printed at page 33 of the Record.)

The employer and insurance carrier then commenced a proceeding for review of the compensation order pursuant to section 21(b) of the Act (33 U.S. C.A., sec. 921(b)), alleging that the compensation order was not in accordance with law. The bill of complaint stated as the ground or reason why the compensation order was not in accordance with law that there was no substantial evidence that the injury arose out of and in the course of employment (which was the issue raised before the deputy commissioner). Libelants, however, urged *in the argument* before the court below, as an additional ground, that the deputy commissioner did not have jurisdiction to make the award (R. 24, 25), although that issue was raised neither before the deputy commissioner, nor in the bill of complaint (R. 2, 46); in fact, the complaint stated:

> "That the contract was for the performance of service at an air, military or naval base of the United States outside the Continental United States, and *the claim is within the provisions of said Military Bases Act and the jurisdiction of the appropriate Deputy Commissioner.*" (R. 5.)

The respondent deputy commissioner filed exceptions to the libel (R. 22), asking that the complaint be dismissed upon the grounds, in substance, that it appeared from the complaint and the record of proceedings before the deputy commissioner (which was made a part of the complaint), that the finding of the deputy commissioner to the effect that the injury arose out of and in the course of employment was supported by evidence, and thus supported, was final

and conclusive and that the compensation order was in accordance with law.

The case came on for hearing on January 25, 1943, on the respondent's exceptions to the libel. (The only matter before the court was the hearing on respondent's exceptions to the libel (R. 31); libelants were not in a position to make a motion for judgment on the pleadings or for summary judgment since no answer had been filed by respondent.) The court, apparently in disposition of the exceptions to the libel, granted the prayer of the libel to set aside the compensation order and entered an order to that effect on March 30, 1943 (R. 30); another order again setting aside the compensation order was entered on April 15, 1943. (R. 31.) The court subsequently made findings of fact (R. 57) in which the court found, in substance, that the compensation order was not in accordance with law because there was no evidence before the deputy commissioner that the injuries sustained by Keil arose out of and in the course of the employment, and that there was no evidence before the deputy commissioner that the injuries were sustained while Keil was upon a vessel upon the navigable waters of the United States or upon a defense base outside the continental United States. The conclusions of law of the court (R. 61) in effect repeat the finding that the injuries did not arise out of and in the course of employment, and that the deputy commissioner did not have jurisdiction.

The questions for determination of this court appear to be:

(1) Whether there was evidence before the deputy commissioner to support his finding of fact that the injuries arose out of and in the course of employment;

(2) Whether the lower court properly considered the question of jurisdiction of the deputy commissioner, that issue not having been raised before the deputy commissioner or in the complaint; and

(3) Assuming the question of jurisdiction of the deputy commissioner was properly before the reviewing court, whether that court correctly decided that the deputy commissioner did not have jurisdiction to hear the claim and make the award.

SPECIFICATION OF ERRORS.

1. The court below erred in finding that there was no evidence to support the finding of fact of the deputy commissioner that the injuries arose out of and in the course of employment.

2. The court below erred (a) in considering any question of jurisdiction, and (b) in finding and in concluding that the deputy commissioner had no jurisdiction to hear the claim and make the award.

3. The court below erred (a) in failing to give finality to the findings of fact of the deputy commissioner which were supported by evidence, (b) in reconsidering said evidence, and (c) in considering a matter of jurisdiction which was not in issue before

the deputy commissioner and which moreover had been admitted by agreement before the deputy commissioner and again admitted in the libel.

4. The court below erred in setting aside the compensation order.

5. The court below erred in denying respondent's exceptions to the libel.

SUMMARY OF ARGUMENT.

I. The deputy commissioner found that the employee's injuries arose out of and in the course of his employment; there was evidence to support this finding of fact, and it is therefore final and conclusive and not subject to judicial review.

II. The claim came within the express provisions of the Defense Bases Act.

The United States district court, therefore, erred in setting aside the compensation order upon the stated grounds that the injuries did not arise out of and in the course of employment and that the claim did not come within the provisions of the Defense Bases Act.

ARGUMENT.

I.

THE EVIDENCE SUPPORTS THE FINDING OF THE DEPUTY COMMISSIONER THAT THE INJURIES AROSE OUT OF AND IN THE COURSE OF EMPLOYMENT AND THUS SUPPORTED IS FINAL AND CONCLUSIVE.

Before proceeding to indicate the evidence which in our opinion supports the finding complained of, it may not be inappropriate to invite the court's attention to the following well established principles of compensation law.

The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family: *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner,* 284 U.S. 408 (1932); *Fidelity & Casualty Co. of New York v. Burris,* 61 App. D.C. 228, 59 F. (2d) 1042 (1932); *Associated General Contractors of America, Inc., et al. v. Cardillo, deputy commissioner,* 70 App. D.C. 303, 106 F. (2d) 327 (1939); *DeWald v. Baltimore & O. R. Co.,* 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. October 8, 1934, 293 U.S. 581.

In the absence of substantial evidence to the contrary the presumption is "That the claim comes within the provisions of this Act"; section 20(a) of the Longshoremen's Act.

The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill: *Grant v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D.C. Wash. 1931); *United Employees*

Casualty Co. v. Summerous, 151 S.W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner,* 56 F. (2d) 654 (D.C. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner,* 49 F. Supp. 75 (D.C. N.D. W. Va. 1943).

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Del Vecchio v. Bowers,* 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162 (1933); *Crowell, deputy commissioner v. Benson,* 285 U.S. 22 (C.C.A. 5, 1932); *Jules C. L'Hote, et al. v. Crowell, deputy commissioner,* 286 U.S. 528 (1932), 71 C.J. 1297, sec. 1268; *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941).

The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by the statute, and the powers properly to be exercised by the court are those only which are expressly conferred by the said Act: *Associated Indemnity Corp. v. Marshall, deputy commissioner,* 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner,* 67 App. D.C. 52, 89 F. (2d) 796 (1937); *Luyk v. Hertel,* 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton,* 9 S.W. (2d) 65 (Texas 1928); *Nierman v. Industrial Commission,* 329 Ill. 623, 161 N.E. 115 (1928); *Town of Albion v. Industrial Commission,* 202 Wis. 15, 231 N.W. 249 (1930). Compare also: *Bassett, deputy commissioner v. Massman Con-*

struction Company, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 62 S. Ct. 92.

The following is a reference to so much of the testimony taken before the deputy commissioner at the hearings before him as is considered sufficient to show that the findings of fact of the deputy commissioner are supported by evidence. This reference is not intended to cover all of the testimony as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the deputy commissioner.

On May 12, 1942, Keil, who lived in Denver, Colorado, agreed to go to Hawaii to work for Contractors Pacific Naval Air Bases. A preliminary agreement was made in Denver, Colorado, and the employer furnished transportation to Keil and the other workmen to San Francisco, where the employer was to furnish further transportation by boat to Hawaii. On arrival in San Francisco on the 14th day of May, a formal contract was signed between the employer and Keil (exhibit A attached to and made part of the complaint) whereby Keil agreed to work as a steamfitter's helper on the Pacific Islands at a stated rate of pay plus board and lodging or $10.50 per week in lieu thereof, salary to commence on May 14, 1942, transportation to be furnished by the employer. Keil stayed at a hotel in Oakland, California, awaiting the boat which was expected to take them on May 21, but it took only three of the men and the remaining, including Keil, were told to go back to the hotel and await another call. Keil did as directed. On the

evening of May 24, he and another workman *went out to supper* and on the way back to the hotel Keil was hit by an automobile which severely injured him. (R. 47 to 51.)

Appellees contend that the injury did not arise out of and in the course of the employment. In the consideration of the question involving injuries which are sustained by the employee on the way to the place of employment, it might be well to review briefly that aspect of compensation law.

In the beginning, when compensation laws were first enacted, the courts strictly and literally construed the phrase "arising out of and in the course of employment" and no injury was considered compensable unless it arose during the actual working hours and while the employee was actually at work. The courts, however, were not long in recognizing that such a strict construction of the law did not tend to achieve the purpose and intent of compensation laws. Gradually the courts came to the conclusion that an employee might still be "employed" even though his physical or manual work had ceased for the time being or had not begun and that the mere fact that an injury befell the employee at a moment when he was not performing manual labor for his employer did not necessarily mean that the accident did not arise out of or in the course of the employment. In the case of *Voehl v. Indemnity Insurance Co. of North America,* 288 U.S. 162, 169, the Supreme Court said:

> "The general rule is that injury sustained by employees when going to or returning from their

regular place of work are not deemed to arise out of and in the course of their employment. Ordinarily the hazards they encounter in such journeys are not incident to the employer's business but this general rule *is subject to exceptions which depend upon the nature and circumstances of the particular employment.* 'No exact formula can be laid down which will automatically solve every case.' *Cudahy Packing Co. v. Paramore,* 263 U.S. 418, 424. See, also, *Bountiful Brick Co. v. Giles,* 276 U.S. 154, 158. While service on regular hours at a stated place generally begins at that place, there is always room for *agreement by which the service may be taken to begin earlier or elsewhere.* Service in extra hours or on special errands has an element of distinction which the employer may recognize by agreeing that such service shall commence when the employee leaves his home on the duty assigned to him and shall continue until his return. And agreement to that effect may be either express or be shown by the course of business. In such case the hazards of the journey may properly be regarded as hazards of the service and hence within the purview of the Compensation Act." (Italics supplied.)

In the *Voehl* case, the Supreme Court specifically held that the deputy commissioner's findings of fact on the question *whether the employee's injury arose out of and in the course of his employment* should be regarded as final and conclusive where supported by evidence. There is a long line of decisions holding that under certain circumstances an injury sustained before or after working hours while the employee was going to or coming from the locus or scene of

his work may arise out of and in the course of employment. See *Swanson v. Latham,* 90 Conn. 87, 101 Atl. 492; *Larke v. Hancock Mutual Life Insurance Co.,* 90 Conn. 303, 97 Atl. 320, L.R.A. 1916 E. 584; *Cudahy Packing Co. v. Industrial Commission of Utah,* 60 Utah 161, 207 Pac. 148, 28 A.L.R. 1394; *Lumberman's Reciprocal Association v. Behnken,* 112 Texas 103, 246 S.W. 72, 28 A.L.R. 1402; *Lamm v. Silver Falls Indemnity Co.,* 286 Pac. 527 (Oregon 1930); *Littler v. Fuller Co.,* 223 N.Y. 369; *Donovan's Case,* 217 Mass. 76; *Crems v. Guest,* 1 K.B. 469 (English).

The question of entitlement to compensation for injuries sustained outside the working hours arises most frequently where the employee is being transported to and from work. What are the circumstances which would permit a finding that an injury sustained by an employee on his way to or from work arose out of and in the course of his employment? As was stated by the Supreme Court in the *Voehl* case, *supra,* "No exact formula can be laid down which will automatically solve every case." But a brief review of recent cases involving that question will indicate the circumstances and factors which the courts have considered important.

In the case of *Southern States Mfg. Co. v. Wright,* 200 So. 375 (Fla. 1941), the employee was injured while being transported in a truck of the employer to the place of employment. The injury occurred prior to working time and during a period for which the employee was not being paid. In affirming an award of compensation the court said:

"Generally it appears that the employer's liability in such cases depends upon whether or not there is a contract between the employer and employee, express or implied, covering the matter of transportation to and from work.

"* * * So, in this case where the employer required the services of the employee in its milling plant at Bonifay, and *as an incident to procuring such services there,* arranged for the transportation of the employee on the employer's truck to and from Marianna, the place where the employee lived, to and from Bonifay, there existed an implied, if not expressed, contract that the employer would provide such truck for such transportation and that the employee would use such truck for such transportation under whatever terms were agreed upon. Such transportation so had, received and used was an *incident to the employment and was exercised in the furtherance of the employment.*" (Italics supplied.)

In the case of *Taylor v. M. A. Gammino Construction Co.,* 18 Atl. (2d) 400, 127 Conn. 528 (1941), the employee worked until an early hour in the morning on an emergency job and was authorized by the boss to use a truck in which to ride home. The next day the emergency continued and the employee took the same truck home although he was not given special permission on that occasion. He was injured on the way home. The court in affirming the award of compensation, said:

"An employer may by his dealing with an employee or employees annex to the actual performance of the work, as *an incident of the employment, the going to or departure from the work;*

to do this it is not necessary that the employer should authorize the use of a particular means or method, although that element, if present, is important; it is enough if it is one which, from his knowledge of and acquiescence in it, can be held to be *reasonably within his contemplation as an incident to the employment,* particularly where it is of benefit to him in furthering that employment." (Italics supplied.)

In the case of *Crysler v. Blue Arrow Transportation Lines,* 295 Mich. 606, 295 N.W. 331 (1940), the employee was engaged in driving a truck between Grand Rapids and Chicago. At Chicago the truck was unloaded, reloaded and driven back to Grand Rapids. Whenever the truck arrived at Chicago too late on Saturday to be reloaded, the employee had the choice of staying at Chicago until Monday or of going back to Grand Rapids on another truck of the company. On the occasion in question the employee arrived at Chicago on Saturday and rode another truck back to Grand Rapids. On Sunday he boarded a truck in Grand Rapids to return to Chicago and was injured en route. The question was whether his injury was sustained in the course of his employment. The court, affirming an award to the employee, stated:

"Solution of the problem in the present case is aided by the test suggested in the Knopka case, 'whether under the contract of employment, *construed in the light of all the attendant circumstances,* there is either an express or implied undertaking by the employer to provide the transportation.'

"In the case before us there was a clear undertaking on the part of the employer to furnish

weekend transportation between Grand Rapids and Chicago whenever the last trip of the week did not leave the driver in his home town." (Italics supplied.)

In the case of *Rubeo v. Arthur McMullen Co.,* 193 Atl. 797 (N.J. 1937), the employee was hired as a skilled concrete worker to do some work on a dock which the employer was building on Staten Island, New York, some distance from his home. The evidence was in conflict as to whether the employee was to be provided with transportation from his home to the site of the work, but it was clearly shown that the superintendent regularly transported the employee to the job and back in one of the company trucks. The injury occurred on the homeward trip. In affirming an award of compensation the court said:

"When the accident happened, the essential statutory relation, in popular understanding and intent, had not been terminated. The line of delineation is not so finely drawn. The provision of transportation, if not the subject of an express or implied undertaking binding under any and all circumstances, *was plainly within the contemplation of the parties,* at the time of the making of the contract of employment, as the thing to be done when in special circumstances the common interest would therefore be subserved. But however this may be, the furnishing of this accommodation grew, with the knowledge and acquiescence, if not indeed the direction of the employer, into a practice *grounded in mutual convenience and advantage.* The deceased employee, while not directly concerned, in the journeys to and fro, with the performance of the work for

which he was employed, was yet engaged in that which, by mutual consent was considered as incidental to the employment. It was a thing so intimately related to the particular service contracted for as to be deemed, in common parlance, a part of it. This is the legislative sense of the term 'employment.' *The requisite relation of master and servant continued during the journey; and the hazards thereof are therefore regarded as reasonably incident to the service bargained for.*" (Italics supplied.)

In the case of *Lamm v. Silver Falls Timber Co.*, 286 Pac. 527 (Oregon 1930), an employee of the lumber company was injured while returning to camp from town where he had gone over the weekend. In deciding that the employee's injury came within the provisions of the workmen's compensation law the court said:

> "*From the foregoing, the conclusion seems justifiable that the plaintiff would not have been injured but for his employment. It is true that when he was injured he was not working for the defendant, but he was in its employ.* His work did not begin until the following morning; but his employment began when the defendant accepted the plaintiff into its employ some months previously.
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> * * * * * * *
>
> "We come now to the more specific question whether the injury arose out of and in the course of the employment. This court, as well as other courts, has many times pointed out that the problem, whether an injury arises out of and in the course of the employment, is not to be determined by the precepts of the common law governing

the relationship between master and servant; these ancient rules include the principles defining negligence, as assumption of risk, fellow-servant doctrine, contributory negligence, etc. Likewise, all courts are agreed that there should be accorded to the Workmen's Compensation Act a broad and liberal construction, that doubtful cases should be resolved in favor of compensation, and that the humane purposes which these facts seek to serve leave no room for narrow technical constructions. * * *

"One of the purposes of the Workmen's Compensation Acts is to broaden the right of employees to compensation for injuries due to their employment. Since these acts contemplate compensation for an injury arising out of circumstances which would not afford the employee a cause of action, the right to redress is not tested by determining whether a right of action could be maintained against the employer. Stark v. State Industrial Accident Commission, 103 Or. 80, 204 P. 151. The word employment, as used in such legislation, is construed in its popular signification. We quote from the decision of the Montana Court in Wirta v. North Butte Mining Co., 64 Mont. 279, 210 P. 332, 335, 30 A.L.R. 964; 'The word "employment" as used in the Workmen's Compensation Act, does not have reference alone to actual manual or physical labor, *but to the whole period of time or sphere of activities, regardless of whether the employee is actually engaged in doing the thing he was employed to do.* * * * To say that plaintiff "ceased" working for the defendant is not equivalent to saying that he severed the relation of employer and employee.'

"Since the courts have recognized the broad humane purposes of the act, they have readily perceived that the mere fact that the injury befell the claimant, at a moment when he was not performing manual labor for his employer, does not necessarily prove that the accident did not arise out of or in the course of the employment. The words just mentioned which are a part of most of the acts are never qualified by the limitation that the injury must have been inflicted during regular working hours.

* * * * * * *

"Since employment is construed in its popular signification, an employee is frequently granted compensation from the fund, even though his hours of service have not yet begun, or have ended, and even though he is not upon the premises of his employer engaged in physical service of the latter.

* * * * * * *

"A careful study of the foregoing cases, as well as the ones to which reference will later be made, seems to warrant the conclusion that the courts deem that the theory of Workmen's Compensation Acts is to grant compensation to an injured workman on account of his *status*. He is an integral part of the industry, and the latter should bear the costs of his recovery like it bears the costs incurred by the replacement of mechanical parts. *When the status of an employee, that is his relationship to the industry, brings him within the zone where its hazards cause an injury to befall him, he is entitled to compensation.* The courts which allowed the above recoveries, and other courts to whose decisions we shall later advert, evidently did not confine their searches to the doubtful words 'accident arising out of

and in the course of his employment,' but bore in mind this general purpose of the act, as revealed by its entire text." (Italics supplied.)

In the case of *Ohmen v. Adams Bros.,* 109 Conn. 378, 146 Atl. 825, the court aptly indicated the conditions under which an employee is covered under the compensation law as follows:

> "We have held that an injury to an employee is said to arise in the course of his employment at a place where he may reasonably be, and while he is fulfilling the duties of his employment, or engaged in doing something incidental to it, or something which he is permitted by the employer to do for their mutual convenience. * * *
>
> "We have also held: 'An injury arises out of an employment when it occurs in the course of the employment and is the result of a risk involved in the employment or incident to it, or to the conditions under which it is required to be performed. The injury is thus a natural or necessary consequence or incident of the employment or of the conditions under which it is carried on.'"

Is it necessary that the employee be in or on a vehicle, as appellees intimated in the court below (R. 19), in order that liability for compensation shall attach to an injury sustained other than during actual working hours or at a place other than the ordinary place of work? To so contend is to fail to comprehend the basis upon which these cases rest. It is that the *employment status* is considered to extend beyond the customary working hours or beyond the em-

ployer's premises because the agreement or contract of employment, express or implied, contemplates that the employee shall do the thing or be at the place, resulting in injury. (See the recent case of *Ward v. Cardillo, deputy commissioner,* 135 F. (2d) 260 (App. D.C. 1943), where it was urged, as in the instant case, that the employment had not begun because the transportation had not begun.) There are a number of occasions when injuries, incurred away from the employer's premises and outside the regular working hours, are nevertheless considered as arising out of and in the course of employment even though the employee is not riding in or on a vehicle. For example, an employee may be within the coverage of the compensation law on his way to or from the place of work if the contract of employment provides or contemplates that he be paid for the time consumed in going to or from the place of work. See *Traynor v. City of Buffalo,* 208 App. Div. (N.Y.) 216; *Orange Screen Co. v. Drake,* 151 Atl. (N.J.) 486; *Fenton v. Industrial Accident Commission of California,* 112 Pac. (2d) 763; *Cymbor v. Binder Coal Co.,* 285 Pa. 440, 132 A. 363; *Ohmen v. Adams Bros.,* 146 Atl. 825, 109 Conn. 378 (1929). It is the extension of the *employment status* to the time and place of the injury which is the basis of the liability for payment of compensation, not the fact that the employee is in a vehicle. If the employment brings the employee to the place where he encounters a risk peculiar to that place, an injury resulting from that risk is compensable.

Street risks to which the employee is exposed by reason of his employment are hazards of the employment. *Katz v. Kadans,* 232 N.Y. 420. See also, *Proctor v. Hoage, deputy commissioner,* 65 App. D.C. 153, 81 F. (2d) 555, which was a case arising under the Longshoremen's Act (the basic Act involved in the instant case), as made applicable to the District of Columbia. In the latter case the employee was injured by an automobile while crossing a street on his way home. He was an insurance agent and had just left his superior officer who ordered him to go home and complete certain reports and have them ready for the morning. The court said that the employee "was acting under and by command of his employer in the discharge of his duties as employee and that while going home intending to perform the work which had been directed by his superior officer to perform at that place he was engaged in the discharge of his duties as an employee of the company." In the case of *Sheehan v. Board of Trustees,* 281 N.Y. 613, the court stated: "The test seems to be whether at time of the accident his work compelled him to travel there."

Where an employee is sent by his employer upon a long trip in connection with the employment the risks incidental to his itinerary are special in character. See recent case of *Lepow v. Lepow Knitting Mills, Inc.,* 288 N.Y. 377, decided by the New York Court of Appeals on July 29, 1942. There the court said:

> "In *Matter of Marka v. Gray* (251 N.Y. 90), where this court considered the question * * *

> whether the risks of travel are also risks of the employment, it was said, per Chief Judge Cardozo (p. 93), '* * * the decisive test must be whether it is the employment or something else that has sent the traveler forth upon the journey or brought exposure to its perils.' "

In the instant case the employee was on a special mission for his employer; he was on his way to Hawaii to assist in the construction of a defense base which his employer had contracted to construct; he and the employer specifically agreed that his employment status should begin as of May 14, 1942, and continue while he was waiting for the boat on which he was to complete the journey which had begun in Denver, Colorado; it was certainly contemplated that the employee would not remain confined to his hotel or hotel room while waiting for the boat but would go out for such things as meals, fresh air, and necessary recreation, etc.; the journey from Denver, Colorado, to Hawaii should be considered as a single undertaking and an injury sustained in the course thereof as one arising out of and in the course of the employment since the risk was reasonably within contemplation of the parties. A voyager making a trip of thousands of miles encounters many hazards in addition to those encountered on the boat, train, bus or other conveyance, which are hazards of the voyage and would not be encountered if the employee had remained at home; hazards are encountered in port upon completion of one leg of the journey and while waiting to resume another. It would be a narrow construction of the compensation law to say that

such risks and hazards were not within the contemplation of the parties at the time the contract of employment was entered into, especially where the contract specifically provides that the employment status shall begin prior to and continue during the journey. Coverage of an employee under the compensation law should not take on the characteristics of a kaleidescope wherein he is protected under the law against injury one minute and unprotected the next. An employee who has been ordered to proceed to a distant country and who in the course of the journey, while awaiting transportation at a port of embarkation is injured in a street accident by an automobile while returning to the hotel seems clearly to have been in an employment status and to have been injured as the result of a risk created by the employment. Why should not the industry in which the employee was employed bear the burden of the injury to one of its employees who was *where he was, at the time he was* because of his journey on behalf of the employer? It is no answer to say that at the time, the employee was performing a personal act,—that he would have had to eat whether he was in Oakland or Denver. The fact is, that were it not for the journey to Hawaii undertaken at the direction of his employer he would not have encountered the particular traffic hazard or risk which caused his injury. It was the employment which brought him to that place and exposed him to that risk. *Katz v. Kadans, supra; Roberts v. Newcomb & Co.,* 201 App. Div. 759, affirmed 234 N.Y. 553. Compare also, the recent case of *Aguilar v. Standard Oil Co. of New Jersey,* 318 U.S. 724 (1943),

where it was said: "The voyage creates not only the need for relaxation ashore but the necessity that it be satisfied in distant and unfamiliar ports."

Commonalty doctrine obsolete.

In the court below libelants advanced the archaic "commonalty doctrine" as a reason why the employee should not receive compensation for his injuries. (R. 19.) In the early administration of compensation laws some of the states adopted what was then referred to as the "commonalty doctrine". Under such doctrine it was deemed necessary to show that the employee was subject to a greater risk or hazard than that to which the public in general was subjected. This doctrine led to so many injustices that it has been repudiated wherever critical judicial inquiry into all of its aspects has been made. Such doctrine has *not* been adopted in decisions arising under the Longshoremen's Act. The doctrine was specifically rejected by the United States Circuit Court of Appeals for the fourth circuit in the leading case of *Baltimore and Ohio R.R. Co. v. Clarke, deputy commissioner,* 59 F. (2d) 595. In that case the court said:

> "And we think it equally clear that heat prostration resulting from the conditions of employment, as was found by the deputy commissioner in this case, is compensable under the statute without reference to whether there was any unusual or extraordinary condition in the employment not naturally and ordinarily incident thereto. The statute provides that 'the term "injury" means accidental injury or death arising out of

and in the course of employmnt.' 33 USCA Sec. 902. *It says nothing about unusual or extraordinary conditions; and there is no reasonable basis for reading such words into the statute.* A workman who sustains heat prostration as the result of the working conditions under which he labors, has sustained an injury 'arising out of and in the course of his employment'; and the fact that other workmen may not have been affected or that he may have been rendered more readily susceptible to injury than they were by reason of his physical condition cannot affect the matter." (Italics supplied.)

Such doctrine was also specifically rejected by the United States Court of Appeals for the District of Columbia in *New Amsterdam Casualty Co. v. Hoage, deputy commissioner,* 62 F. (2d) 468, which arose under the Longshoremen's Act as applied in the District of Columbia. The court in that case said that:

> "In the early administration of compensation laws, the rule was often adopted that injuries occurring upon the public highways due to traffic hazards did not 'arise out of' the workmen's employment. This rule was founded upon the theory that such hazards are common to the community at large and are not incident to particular employments, and it was held that the compensation acts were not designed to exempt the employee from such risk. *This doctrine, however, has since been abandoned.*" (Italics supplied.)

In the case of *Aetna Life Insurance Co. v. Hoage, deputy commissioner,* 63 F. (2d) 818, the appellant attempted to invoke the old "Commonalty Doctrine"

in heat stroke cases, arguing that the employee in that case was not subject to any greater heat than was common to the community in general. In the *Aetna Life Insurance Company* case the court definitely reaffirmed the position previously taken in the *New Amsterdam Casualty Company* case, *supra,* by holding that:

> "Although the risk may be common to all who are exposed to the sun's rays on a hot day, the question is whether the employment exposes the employee to the risk."

The leading case in New York which destroys the effect of the obsolete "Commonalty Doctrine" is the *Matter of Katz v. Kadans & Co.,* 232 N.Y. 420, 134 N.E. 330, wherein the court said that:

> "But the fact that the risk is one to which every one on the street is exposed, does not itself defeat compensation. Members of the public may face the same risk every day. *The question is whether the employment exposed the workman to the risks by sending him onto the street, common though such risks were to all on the street.*" (Italics supplied.)

One of the cases upon which appellees relied and upon the basis of which the lower court was urged to set aside the compensation order in this case is that of *Mobile and Ohio R.R. Co. v. Industrial Commission,* 28 F. (2d) 228, which was decided in 1928. In that case the employee was killed as the result of a tornado which blew down the shop in which he was working and many other buildings in the same community. Applying the "commonalty doctrine" the

court stated that the employee was exposed to no more risk than the general public. Besides applying a doctrine now outmoded, the factual situation in that case differs from that of the instant case. There the employee was injured as the result of a so-called "Act of God"; in the instant case the employee was injured as the result of a traffic accident which is a recognized man-made risk to which every traveler is exposed and since he became a traveler because of his employment, his employment exposed him to the risk. A reading of the opinion in the *Mobile* case, *supra,* shows that it is replete with illogic and with exaggerated examples and illustrations which have largely disappeared from modern decisions.

The Longshoremen's Act is recognized as one of the most liberal of any workmen's compensation law in the United States. It was modeled after the New York workmen's compensation law, which is also recognized as one of the most advanced of compensation laws. *Bethlehem Shipbuilding Corp., Ltd. v. Monahan, deputy commissioner,* 54 F. (2d) 349 (C.C.A. 1, 1931); *Luckenbach Steamship Co., Inc. v. Marshall, deputy commissioner,* 49 F. (2d) 625 (D.C. Oregon 1931); *Mahoney v. Marshall, deputy commissioner,* 46 F. (2d) 539 (D.C. W.D. Wash. N.D. 1931); *Hartford Accident & Indemnity Co. v. Hoage, deputy commissioner,* 85 F. (2d) 411.

Injuries sustained during "waiting time" are compensable.

It is well established that injuries sustained by an employee while waiting to begin work arise out of and in the course of employment. *West Penn Sand &*

Gravel Co. v. Norton, deputy commissioner, 95 F. (2d) 498 (C.C.A. 3, 1938) (a case also arising under the Longshoremen's Act); *Bull Insular Line, Inc., et al. v. Schwartz, deputy commissioner,* 23 F. Supp. 359 (D.C. N.Y. 1938) (another case under the Longshoremen's Act); *Norris v. New York Central Railroad Co.,* 246 N.Y. 307, 158 N.E. 879 (1927); *Snear v. Eiserloh,* 144 So. 265 (La. App. 1932); *Dzikowska v. Superior Steel Co.,* 103 Atl. 351, 259 Pa. 578; *Wisconsin Mutual Liability Co. v. Industrial Commission of Wisconsin,* 232 N.W. 885, 202 Wisc. 428; *North Carolina R. Co. v. Zachary,* 232 U.S. 248.

This is also true where the "waiting time" involves an interval of "waiting" and eating. In the case of *Cardillo, deputy commissioner v. Hartford Accident and Indemnity Co.,* 109 F. (2d) 674 (App. D.C. 1940), cert. den. 309 U.S. 689 (also under the Longshoremen's Act), the employee had been requested by his employer to drive from Washington, D.C. to Mt. Vernon, Virginia and there to pick up certain passengers who were sightseeing at the National Shrine. While he was waiting for his passengers to make the tour of Mt. Vernon the employee went on a side journey of a few miles to obtain lunch and while he was returning from that journey he sustained an injury. The court said that the *securing of lunch* during the trip was necessary and served the purpose of the employer as well as of the employee.

In the following cases similar waiting and refreshment intervals were held to come within the ambit of the employment. *T. J. Moss Tie Co. v. Tanner,* 44 F.

(2d) 928 (C.C.A. 5, 1930) (a case under the Longshoremen's Act), and *Ballard v. Engel,* 4 N.Y.S. (2d) 363, aff'd in 278 N.Y. 463 (1938). In the latter case the lower court said:

> "It would be taking too technical a view of the law to say that a pause in the actual course of his work by an employee for the purpose of eating is a break in his employment from the time he stops work to the time when he begins again. We must take a broader view and treat the employee as continuing in his employment."

In the same case the Court of Appeals said:

> "We think the evidence warranted the finding that the employment was not interrupted while deceased was *returning from supper* on the occasion in question." (Italics supplied.)

In the case of *In re: Sundine,* 105 N.E. 433, 218 Mass. 1, the court held that an injury sustained by an employee while returning from lunch arose out of and in the course of her employment because "it was an incident of her employment to go out for this purpose".

In the case of *H. W. Nelson R. Const. Co. v. Ind. Comm. of Ill.,* 122 N.E. 113, 286 Ill. 632, the court said:

> "The general rule announced in both English and American decisions is that going to lunch by an employee is an incident of his employment; that the dinner hour although not paid for by the employer is included in the time of employment; that a temporary absence from the place of employment for the purpose of procuring food does

not suspend the employment; that an injury occurring during such a temporary absence arises out of and in the course of such employment."

From the above cases it would seem that during waiting periods or intervals between actual work, the employment does not terminate; the employee continues to be such.

It may be urged by appellees that because the facts are undisputed, the fact question as to whether the injury arose out of and in the course of employment becomes one of law, subject to reconsideration and revaluation. The courts have on several occasions stated that fact questions determined by the deputy commissioner do not become questions of law because the basic facts are undisputed. *Puget Sound Freight Lines, et al. v. Marshall, deputy commissioner,* 125 F. (2d) 876 (C.C.A. 9, 1942); *South Chicago Coal & Dock Co., et al. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); compare: *Gray v. Powell,* 314 U.S. 402 (1941), and *United States v. Morgan,* 313 U.S. 409 (1941). In the case of *Puget Sound Freight Lines, supra,* this Honorable Court stated:

"Because there is no conflict in the evidence, appellants seek to have the claimant's status settled as a matter of law. In the case of South Chicago Co. v. Bassett, 309 U.S. 251, 258, 60 S.Ct. 544, 548, 84 L. Ed. 732, it was urged that 'the question whether the decedent was a member of a "crew" was a question of law,' because the facts were undisputed. But the Supreme Court disagreed with that contention saying that the 'word "crew" does not have an absolutely unvarying

legal significance'. The court there held that the deputy commissioner's determination of the employee's status was conclusive and not subject to judicial review if supported by substantial evidence. See also the opinion of the Circuit Court of Appeals for the Seventh Circuit rendered in the same case, and reported in 104 F. 2d at page 522. We are consequently limited to an inquiry into the existence of any evidence to support the deputy commissioner's finding that Jondro was not a crew-member."

II.

THE QUESTION OF JURISDICTION OF THE DEPUTY COMMISSIONER TO HEAR THE CASE AND MAKE THE AWARD WAS NOT BEFORE THE COURT BELOW, BUT ASSUMING THAT IT WAS, IT WAS ERRONEOUSLY DECIDED.

The employer and carrier did not raise the issue before the deputy commissioner that the Longshoremen's Act, as extended by the Defense Bases Act, was not applicable to the injuries sustained by Keil; in fact it was stipulated before the deputy commissioner that "the only issue is whether such injury occurred in the course of and arose out of claimant's employment". (R. 46.) Issues raised in proceedings for judicial review under section 21(b) of the Longshoremen's Act must have been first raised before the deputy commissioner, and where the record does not show that such issues were first raised before the deputy commissioner they will be considered as having been waived and will not be heard by the court upon judicial review: *Maryland Casualty Company v. Cardillo,*

deputy commissioner, and Mary Najjum, 107 F. (2d) 959 (App. D.C. 1939); *Southern Shipping Co. v. Lawson, deputy commissioner,* 5 F. Supp. 321 (D.C. Fla. 1933); *Metropolitan Casualty Insurance Co. v. Hoage, deputy commissioner,* 67 App. D.C. 54, 89 F. (2d) 798 (1937); *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner,* 18 F. Supp. 729 (D.C. N.Y. 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner,* 23 F. Supp. 748 (D.C. N.Y. 1938); *State Treasurer v. West Side Trucking Co.,* 198 App. Div. 432, affirmed 233 N.Y. 202, 135 N.E. 544; *Burmester v. De Lucia,* 263 N.Y. 315, 189 N.E. 231 (1934); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941). Moreover, libelants alleged in their complaint (R. 6), that the only issue was whether the injury occurred in the course of and arose out of claimant's employment, and voluntarily alleged (R. 5, 45) that the contract of employment was for the performance of services at a defense base and that the claim was within the provisions of the Defense Bases Act.

The courts have held that the parties cannot object to the jurisdiction of a tribunal hearing the compensation case for the first time upon a review of the case. *Chicago Packing Co. v. Industrial Board of Illinois,* 282 Ill. 497, 118 N.E. 727 (1918); *Klettke v. C. & J. Commercial Driveway, Inc.,* 250 Mich. 454, 231 N.W. 132 (1930); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Grasselli Chem. Co. v. Simon,* 84 Ind. App. 327, 150 N.E. 617 (1926); *Walker v. Speeder Mach. Co.,* 213 Iowa 1134, 240

N.W. 725 (1932); *McCombs Coal Co. v. Alford,* 234 Ky. 42, 27 S.W. (2d) 430 (1930); *Gillard's Case,* 244 Mass. 47, 138 N.E. 384 (1923); *Mark v. Keller,* 188 Minn. 1, 246 N.W. 472 (1933); *Timmerman v. State Ind. Comm.,* 305 Ill. 485, 137 N.E. 440 (1922); *Paradise Coal Co. v. Industrial Comm.,* 301 Ill. 504, 134 N.E. 167 (1922); *Pocahontas Mining Co. v. Industrial Comm.,* 301 Ill. 462, 134 N.E. 160 (1922); *American Milling Co. v. Industrial Comm. of Illinois,* 279 Ill. 560, 117 N.E. 147 (1917).

In the *Chicago Packing* case, *supra,* the court said:

> "One of the contentions raised by plaintiff in error is that deceased was not engaged in an extra-hazardous occupation. Before the arbitrator counsel for both sides agreed that both plaintiff in error and deceased were working under the Workmen's Compensation Act and that the only question in dispute was whether the accident arose out of and during the course of employment. The question now sought to be raised was not urged before the industrial board on review or before the circuit court. By entering into this agreement and not thereafter raising the question either before the arbitrator or the industrial board on review, the plaintiff in error waived the right to raise any question of jurisdiction. American Milling Co. v. Industrial Board, 279 Ill. 560, 117 N.E. 147."

In *Klettke v. C. & J. Commercial Driveway, Inc., supra,* the court said:

> "Defendant, however, contends that the Department of Labor and Industry had no jurisdic-

tion because the accident happened in interstate commerce. This point was not raised in defendant's answer. Before the commission, the parties stipulated that the employer and employee were subject to the act. It is too late to raise the question for the first time in this court."

The court below made a finding of fact that there was no evidence before the deputy commissioner that the injuries were sustained "while said Charles F. Keil, Jr. was employed as a worker (other than a member of the crew) on a vessel lying in or plying the navigable waters of the United States (including any dry dock), nor while said respondent was employed at any military, air or naval base acquired by the United States from a foreign country or on land occupied or used by the United States for military or naval purposes outside the continental limits of the United States." (R. 60.) The court also made a conclusion of law that the deputy commissioner "acted entirely without and beyond his jurisdiction". (R. 61.)

It is submitted that appellees' objections to the jurisdiction of the deputy commissioner came too late and should be considered to have been waived or improperly raised. Moreover, the objections were *not* raised in the pleading but only in a *memorandum* submitted to the court below. The libel or complaint *admitted* agreement with respect to the deputy commissioner's jurisdiction (R. 5), and libelants' memorandum was not only at variance with the complaint, but at variance with the agreements and understandings before the deputy commissioner.

Assuming, however, that the issue whether the claim came within the provisions of the so-called Defense Bases Act (42 U.S.C. secs. 1651-1654), was before the lower court, it was decided erroneously.

When the United States acquired certain lands from Great Britain for defense purposes, and it was decided to turn these and other lands in the Territories into defense bases, Congress realized the necessity of adequate and uniform compensation protection for the employees who should be engaged in the construction of the bases. Instead of going to the trouble and delay of formulating a new compensation law in all of the required details, it adopted and made applicable the compensation features and other main provisions of the Longshoremen's and Harbor Workers' Compensation Act which had been in successful operation for over fourteen years. The section of the Defense Bases Act making applicable the Longshoremen's Act provides as follows:

> "That except as herein modified, the provisions of the Act entitled 'Longshoremen's and Harbor Workers' Compensation Act', approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone,

irrespective of the place where the injury or death occurs." (Italics supplied.)

To say, as appellees do (R. 25), that the Defense Bases Act applies only to injuries which occur upon navigable waters of the United States because the Longshoremen's Act applies only to injuries which occur upon navigable waters of the United States is to disregard the entire purpose of the so-called Defense Bases Act (and the language therein), which was to provide compensation protection for employees who were to be engaged almost entirely in the construction of *land bases;* it is also to disregard the plain wording of the statute that the Act is applicable "irrespective of the place where the injury or death occurs." Statutes should be construed in the light of their purpose and in the light of reason.

Likewise, to say (R. 25) that the so-called Defense Bases Act does not apply because the injuries were not sustained at a defense base outside the continental limits of the United States is again to disregard the express provision of the Act that it applies to injuries sustained "irrespective of the place where the injury or death occurs." This honorable court has already held, in *Liberty Mutual Insurance Company v. Gray, deputy commissioner,* decided August 27, 1943, ... Fed. (2d) ....., that the Defense Bases Act is applicable to injuries sustained by an employee who is injured away from the place of employment.

Local compensation laws inapplicable.

Appellees also contended (R. 25) that inasmuch as Keil resided at an hotel in California awaiting transportation en route from his home in Denver, Colorado (and appellees intimated before the District Court (R. 25)—though there appears to be no evidence to support it—that the employers Contractors Pacific Naval Air Bases (which was an association of contractors) was a resident of California), the workmen's compensation law of California applies, to the exclusion of the Defense Bases Act. When Congress acts within a sphere where it has jurisdiction to act, it is presumed that it intended to exercise to the fullest extent all the power and jurisdiction it had on the subject matter. (*Continental Casualty Company v. Lawson, deputy commissioner,* 64 F. (2d) 802 (C.C.A. 5, 1933.) It can not be doubted that Congress had power to construct defense bases upon lands obtained by treaty from Great Britain, or upon the territorial lands of the United States used for defense purposes. The employment of men and the care of them and their families in case of injury is a necessary incident of the exercise of that authority and power.

The language of section 1 of the Defense Bases Act is substantially the same as section 1 of the Act of May 17, 1928 (45 Stat. 600), making the Longshoremen's Act applicable, by extension thereof, to the District of Columbia. The latter Act provides in part that the Longshoremen's Act "shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of

Columbia, irrespective of the place where the injury or death occurs." Argument such as appellees made below was urged in connection with previous cases relating to the extension of the Longshoremen's Act to the District of Columbia; namely, that the extension was applicable only in the District of Columbia. This argument, however, has never been sustained, and many cases of employees carrying on employment in the District of Columbia, but who sustained injury outside of such District have been held to be within the purview of the Longshoremen's Act as extended to the District of Columbia. Where employment is carried on in the District of Columbia, the District of Columbia Workmen's Compensation Act applies, notwithstanding the injury is sustained while the employee is working outside the District. See *Moyer v. Cardillo, deputy commissioner,* 115 F. (2d) 785 (App. D.C. 1941). By analogy, therefore, the Defense Bases Act applies where there is employment, as in the present case, in connection with any military, air or naval base, "irrespective of the place where the injury or death occurs."

In a recent case involving the question of jurisdiction, *Davis v. Department of Labor and Industries of Washington,* 317 U.S. 249 (1942), the Supreme Court said:

> "Faced with this factual problem we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there

has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy. There we are aided by the provision of the federal act, 33 U.S.C. sec. 920, 33 U.S.C.A. sec. 920, which provides that in proceedings under that act, jurisdiction is to be 'presumed, in the absence of substantial evidence to the contrary.' Fact findings of the agency, where supported by the evidence, are made final. *Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in cases of apparent error.* It was under these circumstances that we sustained the Commissioner's findings in Parker v. Motor Boat Sales, supra." (Italics supplied.)

See also, *Gray v. Powell,* 314 U.S. 402 (1941).

CONCLUSION.

In view of the above, it is respectfully submitted that the findings of fact of the deputy commissioner to the effect that claimant's injuries, which were sustained en route to his place of employment, arose out of and in the course of his employment, is supported by evidence; that the claim came within the provisions of the so-called Defense Bases Act; that the compensation order complained of is in accordance with law; and that compensation should be paid to the employee for his injuries, as the employer agreed to do in the contract of employment. (R. 41, par. 12.)

The orders and decrees of the United States District Court, setting aside the compensation order, should be reversed and the libel directed to be dismissed.

Dated, San Francisco,
October 29, 1943.

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No. 10,507

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WARREN H. PILLSBURY, as Deputy Commissioner for the 13th Compensation District under the Longshoremen's and Harbor Workers' Compensation Act,

Appellant,

vs.

LIBERTY MUTUAL INSURANCE COMPANY, a Mutual Insurance Company, and CONTRACTORS PACIFIC NAVAL AIR BASES, an Association,

Appellees.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

BRIEF FOR APPELLEES.

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No. 10,507

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BRIEF FOR APPELLEES.

JURISDICTIONAL STATEMENT.

This Court has jurisdiction to entertain this appeal by virtue of the provisions of Section 128 of the Federal Judicial Code (Sec. 225 (a), Title 28 U. S. C. A.) in view of the Petition for Appeal filed June 23, 1943 (R. 63), the order allowing appeal filed June 24, 1943

(NOTE): Throughout this brief italics are ours unless otherwise indicated.

(R. 64), and the Citation and Admission of Service filed June 24, 1943. (R. 65.) Said Section 128 provides in part as follows:

> "The Circuit Court of Appeals shall have appellate jurisdiction to review by appeal final decisions——
>
> First—In the District Courts, in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title. * * *"

As stated in the Brief for Appellant this case arises upon a bill of complaint for judicial review of a compensation order filed pursuant to the provisions of Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1924; U. S. C., Title 33, Chapter 18, Sec. 901, *et seq.*), as made applicable to persons employed at certain defense bases by the Act of August 16, 1941 (55 Stat. 622; 42 U. S. C. A., Secs. 1651-1654), hereinafter called "Defense Bases Act."

Section 21(b) of the Longshoremen's Act, *supra,* provides as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred * * *."

Section 3(b) of the Defense Bases Act, *supra,* provides as follows:

> "Judicial proceedings provided under sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs."

STATEMENT OF THE CASE.

Appellant's Statement of the Case should be amended so far as its present wording conveys the inference that the contract of employment out of which this compensation claim arose was made in Colorado. The earlier contract had been terminated at the time of the accident in question. The contract made in California, effective May 14, 1942, will be found on pages 38 to 43 of the Record.

Also, it should be noted that appellant speaks of the employee, Keil, as though to convey the idea that Keil had temporarily absented himself from his work for the purpose of eating when he was injured. The words used are: "He went out to supper."

Keil had not worked that day, which was Sunday. His own story of the matter was that he and his companion first dined at the Acme Cafe, on San Pablo Avenue, Oakland, near 15th or 16th Street. That they walked up to Lake Merritt from the hotel and then back to town, ending up at Seventh and Franklin Streets, where the accident occurred. This was down by the fishermen's dock. (R. 50-51.)

SUMMARY OF ARGUMENT.

1. The award was annulled in view of the law and the facts of this case, which permitted no other action.

2. Comment on cases dealing with the phase of workmen's compensation law here under review.

3. Appellant, as Deputy Commissioner for the 13th Compensation District, was without jurisdiction to make the award, for the reasons hereinafter specified.

ARGUMENT.

I.

THE AWARD WAS ANNULLED IN VIEW OF THE LAW AND THE FACTS OF THIS CASE, WHICH PERMITTED NO OTHER ACTION.

The paragraph of the Longshoremen's and Harbor Workers' Compensation Act defining "injury" is as follows:

"Sec. 2. When used in this act—* * *

(2) The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the wilful act of a third person directed against an employee because of his employment."

It is not, of course, contended by anyone in the instant case that respondent Keil was injured while actually working at his trade, while riding on a stage or train in transit from Denver to Oakland, while riding from a stage or train to his hotel, while in a street car or other conveyance en route to or from the docks from which he was to sail. Such circumstances, if they existed, would make a different case.

When injured the employee was completely master of his own time, course and movements. He was exposed to no greater danger or risk because of his employment than was any other pedestrian near Seventh and Franklin Streets at the time of the accident.

The only manner in which the employee's injury can be connected with his employment is by statement of the obvious fact that if Charles F. Keil, Jr. had not been employed by Contractors Pacific Naval Air Bases for service in Hawaii, he would not have left Denver and consequently would not have been at Seventh and Franklin Streets, Oak-

land, at the time of the accident. This circumstance or condition alone, however, does not create legal liability:

> "In answer to the suggestion that the employee would not have been injured if he had not been at the place of employment, it has been said that in the same causative sense, if he had not come into being he could not have been injured, and that the same argument might be made for a claim against one who sold a carriage to one who was struck by lightning while riding in it."
>
> *Mobile & O. R. Co. v. Industrial Commission,* 28 Fed. (2d) 228, 231.

To the same effect:

> *Storm v. Ind. Acc. Com.,* 191 Cal. 4, 6, 7, 214 Pac. 874.

Law as to traveling employees.

> "The mere fact that the employee is required to travel in order to perform his contract of service does not necessarily make every accident which occurs to him industrial. The test is the same for him as it is for all other employees—he must have been injured by an industrial hazard while performing service called for by his contract of hire. *Thus an injury to a traveling salesman returning from the theater to the hotel is not compensable.*
>
> The same is true where the employee is crossing the street in front of his hotel in order to buy a home-town newspaper, or is on a boat ride.
>
> If the employee is required to travel upon the street or highway or must use other means of transportation in the discharge of his duties, and

while so doing, in the performance of a service for his employer, suffers an injury caused by his traveling, he is entitled to compensation benefits. While engaged in this type of work he is protected when on the highway in the course of his duties, regardless of whether he is then journeying to his next place of service or is returning to his business headquarters or to his home."

Campbell on Workmen's Compensation, Vol. I, pp. 191, 192.

And in another Federal case it has been said:

"It is sufficient to say that an injury is received 'in the course of' the employment when it comes while the workman is doing the duty which he is employed to perform. It arises 'out of' the employment, when there is apparent to the rational mind upon consideration of all the circumstances, a causal connection between the condition under which the work is required to be performed and the resulting injury. Under this test, if the injury can be seen to have followed as a natural incident of the work and to have been contemplated by a reasonable person familiar with the whole situation as a result of the exposure occasioned by the nature of the employment, then it arises 'out of' the employment. But it excludes an injury which cannot fairly be traced to the employment as a contributing proximate cause and which comes from a hazard to which the workman would have been equally exposed apart from the employment. The causative danger must be peculiar to the work, and not common to the neighborhood. It must he incidental to the character of the business and not independent of the relation of master and servant. It need not have

been foreseen or expected, but after the event it must appear to have had its origin in a risk connected with the employment, and to have flowed from that source as a rational consequence."

Mich. Transit Corp. v. Brown, 56 Fed. (2d) 200, 202.

II.

COMMENT ON CASES DEALING WITH THE PHASE OF WORKMEN'S COMPENSATION LAW HERE UNDER REVIEW.

There are many phases of compensation law, and cases in one distinct class afford little help when compared with cases in another class.

For instance on page 29 of his brief appellant directs attention to a number of "waiting time" cases, especially *Cardillo v. Hartford, etc.,* 109 Fed. (2d) 674, where a driver went out of his way at lunch time and while returning from that journey was injured, later recovering compensation. The claimant Keil in the instant case was not driving his employer's automobile at the time he was hurt, but was walking around Oakland at his own direction and pleasure for a stroll after dinner—a dinner, by the way, not paid for by the employer or eaten at a place designated by him. The dinner had no causal connection with the accident.

Voehl v. Indemnity Ins. Co. of North America, 288 U. S. 162, 169, 77 L. Ed. 676 (Appellant's Brief, p. 15) is a leading case by way of exception to the general rule that injuries sustained by employees going to or returning from work are not deemed to arise out

of and in the course of their employment. Voehl had charge of a refrigeration plant in Washington, D. C. He was often called to the plant on Sundays and at odd times in emergency. By his contract of employment it was agreed he should be paid a specific hourly wage from the time he left home, and five cents a mile for use of his automobile. Summoned for work on a Sunday, Voehl was injured in an automobile accident. The Supreme Court held this to be an exception to the going and coming rule and reversed the lower court, which had held the accident not compensable. The Voehl case, however, is in no sense on all fours with the one at bar.

In *Lamm v. Silver Falls Timber Co.,* 133 Or. 468, 286 Pac. 527, the employee was injured while returning from town on his employer's logging train which the employees habitually used in order to get to the mill at all. This use was with the knowledge and consent of the logging company, and the injuries were found compensable.

Appellant's table of authorities covers five pages, yet so far as appellees have been able to detect, there is not among all these cases a single one wherein a workman's injuries have been declared compensable when they occurred, as here, on a non-working day; while he was on no errand for his employer; while he was boarding himself and eating where and when he pleased; while he was not engaged in travel movements incident to his employment, was not in any way under his employer's direction at the time he was injured, and was not injured by an instrumentality owned or controlled by the employer.

In other words: A compensable injury case is not presented by a man traveling from the mainland to Honolulu with fare paid, when he is run down by an automobile on the streets of Oakland while strolling about for his own pleasure. His fare from Denver to Oakland had been paid and he was awaiting his employer's orders to proceed on board ship. That was the sole causal relation of workman to injury.

For additional authorities see:

Torrey v. Ind. Acc. Com., 132 Cal. App. 303, 22 Pac. (2d) 525 (traveling inspector drowned while taking boat ride for his own pleasure);

Morgan v. Hoage, 72 Fed. (2d) 727 (as to what is "course of employment");

Gompert v. London Acc. Guar. Co., 100 Fed. (2d) 352.

And for more pertinent cases and detailed discussion of the questions involved see:

Mobile and O. R. Co. v. Ind. Com., 28 Fed. (2d) 228, supra;

Campbell on Workmen's Compensation, Vol. 1, pp. 103-113.

III.

APPELLANT, AS DEPUTY COMMISSIONER FOR THE 13TH COMPENSATION DISTRICT, WAS WITHOUT JURISDICTION TO MAKE THE AWARD FOR THE REASONS HEREINAFTER SPECIFIED.

In annulling the award herein the District Court filed no opinion. Therefore it cannot certainly be said whether the court merely depended upon the fact

that the Defense Bases Act of 1941 did not by its own terms purport to be operative in the continental United States, or went further and considered constitutional grounds, or both. (The Defenses Bases Act is printed as an appendix hereto.)

As to the Act itself no argument is necessary. It distinctly provides that it shall be operative only "outside the Continental limits of the United States."

Keil was hired in California by a California contractor. The relationship thereafter developing was of the state, not the nation, for no federal territory was involved.

> "The granting or denial of compensation by the commissions, boards, bureaus and courts is based principally upon the following legal theories or statutory requirements or a combination of both:
>
> 1. The compensation law of the place of the making of the contract becomes a part of the contract of employment and that law is *exclusively* applicable.
>
> 2. The law of the place of the accident is applicable, regardless of where the contract was made, *because the workmen's compensation law is a police power measure* or because that state has a superior governmental interest, especially if the injured employee is also domiciled there or may there become a public charge.
>
> 3. Both the law of the place of the making of the contract and the law of the place of the accident are applicable.
>
> 4. The law of the situs of the employing industry is applicable.

5. The law of the forum is not applicable when neither the contract was made there nor the accident occurred there."

Schneider's Workmen's Compensation, Third Edition, Text Vol. 1, Sec. 155, p. 447.

"The constitutionality of the provisions of the California statute awarding compensation for injuries to an employee occurring within its borders, and for injuries as well occurring elsewhere, when the contract of employment was entered into within the state is not open to question."

Pacific Employers Ins. Co. v. Industrial Accident Commission, 306 U. S. 493, 59 S. Ct. 629 (1939), on certiorari to the Supreme Court of California, 10 Cal. (2d) 567, 75 Pac. (2d) 1058.

The Commission could have no greater territorial jurisdiction than given it by Congress.

In making an award for an injury occurring on California soil the Commission acted beyond any power delegated to it by Congress (for the Commission is but a Court under another name).

"Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. Elliott v. Peirsol, 1 Pet. 328, 340, 7 L. Ed.

104; Old Wayne Life Ass'n v. McDonough, 204 U. S. 8, 27 Sup. Ct. 236, 51 L. Ed. 345."

Vallely v. Northern Fire and Marine Ins. Co., 254 U. S. 348, 41 S. Ct. 116, 65 L. Ed. 297.

"Chief Justice Marshall has said that 'Courts which originate in the common law possess a jurisdiction which must be regulated by their common law, until some statute shall change their established principles; but Courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." (Citing cases.)

Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387, 50 L. Ed. 633, 644.

Jurisdiction cannot be conferred and may be invoked at any time:

"As the Supreme Court finds its jurisdiction in the Constitution and all other Federal Courts in acts of Congress in concurrence with the Constitution, no mere act of the parties to litigation can confer jurisdiction, in contradistinction to venue, upon any Court of the Union. In other words, if a Federal Court would not otherwise have jurisdiction of a given case or a particular matter, it cannot acquire it by consent of the parties; and the incumbents of the Court cannot act as to such matters as a Court, for if the record of the Court does not show jurisdiction it is the duty of the Court of its own motion to refuse to exercise it.

However, the parties may admit the existence of facts which show jurisdiction, so that the Courts may act judicially on such admission; but as the jurisdiction must be based upon a state of facts, an admission contrary to the facts does not give jurisdiction."

Hughes on Federal Practice, Vol. I, p. 198, citing

Kaigler v. Gibson, 264 Fed. 240 (D. C. Ga. 1920).

"It is the duty of the Supreme Court to reverse any judgment given below, and remand the cause, with costs against the party who wrongfully invoked jurisdiction. Graves v. Corbin, 132 U. S. 571, 10 S. Ct. 196, 33 L. Ed. 462, 469; Williams v. Nottawa Twp., 104 U. S. 209, 26 L. Ed. 719.

Where the question of jurisdiction, although not raised by either party in either Court, is presented by the record, it must be considered. Chapman v. Barney, 129 U. S. 677, 9 S. Ct. 426, 32 L. Ed. 800, 801."

Honnold on Supreme Court Law, Vol. 2, p. 1410, citing many cases.

In view of the foregoing facts and authorities it is respectfully submitted that the order and decree of

the United States District Court setting aside the compensation order and award should be affirmed.

Dated, San Francisco,
December 3, 1943.

THEODORE HALE,
CARROLL B. CRAWFORD,
Proctors for Appellees.

(Appendix Follows.)

Appendix.

Appendix

(42 U. S. C. A. 1651-1654.)
[PUBLIC LAW 208—77TH CONGRESS]
[CHAPTER 357—1ST SESSION]
[S. 1642]

AN ACT

To provide compensation for disability or death resulting from injury to persons employed at military, air, and naval bases acquired by the United States from foreign countries, and on lands occupied or used by the United States for military or naval purposes outside the continental limits of the United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That except as herein modified, the provisions of the Act entitled "Longshoremen's and Harbor Workers' Compensation Act", approved March 4, 1927 (44 Stat. 1424), as amended, and as the same may be amended hereafter, shall apply in respect to the injury or death of any employee engaged in any employment at any military, air, or naval base acquired after January 1, 1940, by the United States from any foreign government or any lands occupied or used by the United States for military or naval purposes in any Territory or possession outside the continental United States, including Alaska, Guantanamo, and the Philippine Islands, but excluding the Canal Zone, irrespective of the place where the injury or death occurs.

SEC. 2. (a) That the minimum limit on weekly compensation for disability, established by Section 6 (b), and the minimum limit on the average weekly wages on which death benefits are to be computed, established by Section 9 (e), of the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall not apply in computing compensation and death benefits under this Act.

(b) Compensation for permanent total or permanent partial disability under Section 8 (c) (21) of the Longshoremen's and Harbor Workers' Compensation Act, or for death under this Act to aliens and non-nationals of the United States not residents of the United States or Canada shall be in the same amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year immediately prior to the date of the injury, and except that the United States Employees' Compensation Commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens or non-nationals of the United States by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the Commission.

SEC. 3. (a) The United States Employees' Compensation Commission is authorized to extend com-

pensation districts established under the Longshoremen's and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), or to establish new compensation districts, to include any area to which this Act applies; and to assign to each such district one or more deputy commissioners, as the Commission may deem necessary.

(b) Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harbor Workers' Compensation Act in respect to a compensation order made pursuant to this Act shall be instituted in the United States district court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved if his office is located in a judicial district, and if not so located, such judicial proceedings shall be instituted in the judicial district nearest the base at which the injury or death occurs.

SEC. 4. This Act shall not apply in respect to the injury or death of (1) an employee subject to the provisions of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes", approved September 7, 1916 (39 Stat. 742), as amended; (2) an employee engaged in agriculture, domestic service, or any employment that is casual and not in the usual course of the trade, business, or profession of the employer; and (3) a master or member of a crew of any vessel.

Approved, August 16, 1941.

No. 10523

United States
Circuit Court of Appeals
For the Ninth Circuit.

W. S. D. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington Northern Division

Rotary Colorprint, 590 Folsom St., San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF COUNSEL

MESSRS. CHARLES P. MORIARTY and STANLEY J. PADDEN,

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Seattle, Washington.

Attorneys for Appellant.

MESSRS. J. CHARLES DENNIS and GERALD D. HILE,

1012 U. S. Court House,
Seattle, Washington.

Attorneys for Appellee. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States District Court, Western District of Washington, Northern Division

No. 343

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. D. SMITH,

Defendant.

COMPLAINT

Come now J. Charles Dennis, United States Attorney for the Western District of Washington, and G. D. Hile, Assistant United States Attorney for said district, and on behalf of the United States of America make the following allegations for cause of action.

I.

That the defendant W. S. D. Smith is now a resident of Seattle, King County, Washington, within the Northern Division of the Western District of Washington.

II.

That on April 25, 1924, the district Court of the United States of America for the Southern District of the Southern Division, at Los Angeles, California, having jurisdiction of the said defendant W. S. D. Smith, and of the crime charged in the Indictment below referred to, duly and regularly imposed judgment and sentence against the said defendant W. S. D. Smith on all three counts of

an Indictment in cause number 6310 of said Court. That the said defendant W. S. D. Smith was sentenced by said Court to imprisonment for a period of two years on each of the three counts of said Indictment, said terms of imprisonment to run concurrently and said defendant was further sentenced to pay a fine to the United States on said Count I in the sum of $10,000.00 and further to pay a fine to the United States of $1.00 on each of said Counts II and III of said Indictment. Said Count I charged said defendant W. S. D. Smith, [2] and others, with conspiracy to violate Section 593 of the Tariff Act of 1922 (42 Stat. 982). Count II of said Indictment charged the defendant W. S. D. Smith with a violation of Section 593 of the Tariff Act of 1922 (42 Stat. 982); and Count III charged said defendant W. S. D. Smith with a violation of Sections 593 and 813 of the Tariff Act of 1922. That an appeal by the said defendant W. S. D. Smith from said judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit on March 15, 1926, by virtue of a mandate filed and spread of record on March 18, 1926, in said cause number 6310.

III.

That the defendant has failed, neglected and refused to pay said fine or any part thereof and that by virtue thereof said defendant is indebted to the United States in the amount of $10,002.00.

Wherefore, plaintiff prays judgment against the defendant W. S. D. Smith in the sum of Ten Thou-

sand Two and no/100 Dollars ($10,002.00), and for plaintiff's taxable costs and disbursements herein, and for such other and further relief as to the Court may seem just and equitable.

J. CHARLES DENNIS,
United States Attorney.
G. D. HILE,
Assistant United States Attorney.

[Endorsed]: Filed April 1, 1921. [3]

[Title of District Court and Cause.]

AMENDED ANSWER

Comes Now the defendant and for amended answer to the complaint of the plaintiff, admits, denies and alleges as follows:

I.

Answering Paragraph I, plaintiff admits the same.

II.

Answering Paragraph II, plaintiff admits that he was convicted and fined, but denies each and every other allegation therein contained.

III.

Answering Paragraph III, plaintiff denies the same.

For Further Answer and by way of a first affirmative defense, defendant alleges:

I.

That because of the repeal of the National Prohibition Act, said fine has no effect.

For Further Answer and by way of a second affirmative defense, defendant alleges:

I.

That the United States is barred from the enforcement of [6] the claim by the statute of limitations and by the laws of California and the laws of Washington.

For Further Answer and by way of a third affirmative defense, defendant alleges:

I.

That the defendant executed a pauper's oath and under the terms of the sentence was relieved of any liability for said fine.

Wherefore defendant prays that plaintiff's complaint be dismissed and that it take nothing thereby, and that defendant have his costs and disbursements herein to be taxed.

CHARLES R. MORIARTY,
STANLEY J. PADDEN,
Attorneys for Defendant.

State of Washington,
County of King—ss.

W. S. D. Smith, being first duly sworn, on oath deposes and says: That he is the above named defendant; that he has read the foregoing Amended

Answer, knows the contents thereof and believes the same to be true.

W. S. D. SMITH.

Subscribed and sworn to before me this 25 day of March, 1943.

CHARLES P. MORIARTY,
Notary Public in and for the State of Washington,
Residing at Seattle.

Received a copy of the within Amended Answer this 25 day of Mar., 1943. J. Charles Dennis, Attorney for Pltf.

[Endorsed]: Filed Mar. 25, 1943. [7]

[Title of District Court and Cause.]

AGREED STATEMENT OF FACTS

Comes now the United States of America by and through J. Charles Dennis, United States Attorney for the Western District of Washington, and G. D. Hile, Assistant United States Attorney for said District, and Stanley J. Padden and Charles P. Moriarty, attorneys for the defendant W. S. D. Smith, and stipulate that the following shall be deemed an Agreed Statement of Facts in the above entitled cause:

I.

The defendant W. S. D. Smith while a resident of the State of California with others was indicted by the Grand Jury of the United States District Court of the Southern District of California on

February 29th, 1924. A copy of said indictment is attached hereto and made a part of this Agreed Statement of Facts.

II.

To each count of the indictment the defendant W. S. D. Smith entered a plea of not guilty. Thereafter a trial was had, and the defendant W. S. D. Smith was convicted on the conspiracy count and all the other counts of the indictment. Thereafter, on April 25th, 1924, said W. S. D. Smith was sentenced, a copy of the sentence being attached hereto and made a part of this Agreed Statement of Facts.

[8]

III.

The defendant W. S. D. Smith served two years at the United States Penitentiary at Leavenworth, Kansas, and after completion of his sentence the defendant W. S. D. Smith being without funds, was unable to pay the fine of $10,000.00. That thereafter he executed the pauper's oath and served an additional thirty days, and was discharged from the penitentiary upon the termination of said thirty day period.

IV.

Thereafter an execution issued on said sentence imposing a fine of $10,000.00 on Count I of the indictment, and a $1.00 fine on each of the other counts of the indictment, said execution being issued from the District Court of the United States for the Southern District of the District of California, and from such execution the sum of $51.35 was realized thereon, and no more. That outside of

said sum of $51.35 realized from the garnishment proceedings above, no further sums have been paid by the defendant W. S. D. Smith to apply upon said fines.

V.

With the exception of the aforesaid judgment, no other execution has been issued and no further proceedings have been had until the filing of the above entitled action in this Court. In the year 1928 the defendant W. S. D. Smith migrated to Seattle, Washington from California and entered business under his own name in the City of Seattle, County of King, State of Washington, and is now a resident of the City of Seattle, within the Western District of the Northern Division of Washington. It is hereby [9]

Stipulated between the parties that any of the statutes of the State of Washington, or the statutes of the State of California, or the decisions of those states may be presented to the Court for consideration by the Court without being specifically pleaded. It is further

Stipulated that copies of the proceedings in Cause No. 6310 of the United States District Court for the Southern Division (now Central Division) of the Southern District of California, certified to be true and correct by the Clerk of said Court, may be admitted in evidence and be given the same force and effect as if they were originals. It is further

Stipulated between the parties hereto that the plaintiff in this action has no evidence that the defendant W. S. D. Smith had any funds at the

time of his release under the pauper's oath, and has not and does not charge that he concealed or withheld any funds or property from the execution of the judgment. It is further

Stipulated between the parties hereto that in the event the Court overrules the contentions of the defendant W. S. D. Smith on the merits that all questions regarding the issuance of, or validity of the issuance of, the issuance of garnishments and attachments and the imposition of the judgment are herein reserved for later hearing by the Court upon the merits, and the right of the United States of America to the remedy of enforcement by execution, garnishment and attachment upon the judgment sued upon is reserved for hearing after the Court has decided the above entitled cause upon this Agreed Statement of Facts.

J. CHARLES DENNIS,
United States Attorney.
G. D. HILE,
Assistant United States Attorney. [10]
CHARLES P. MORIARTY,
STANLEY J. PADDEN,
Attorneys for Defendant. [11]

No..... Filed.....

Viol: Sec. 37 Federal Penal Code—Conspiracy to violate the Tariff Act of 1922 and Sections 593 and 813 of the Tariff Act of 1922.

INDICTMENT

[Title of District Court.]

At a stated term of said Court, begun and holden at the City of Los Angeles, County of Los Angeles, within and for the Southern Division of the Southern District of California, on the second Monday of January, in the year of our Lord one thousand nine hundred and twenty-four:

The Grand Jurors of the United States of America, chosen, selected and sworn, within and for the Division and District aforesaid, on their oaths present:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 16th day of January, A. D. 1924, at or near the City of Los Angeles, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully, [12] corruptly, fraudulently and feloni-

ously conspire, combine, confederate and agree together and with various and divers other persons to the Grand Jurors unknown, to commit offenses against the United States, to-wit: the offense of knowingly, willfully, unlawfully and feloniously smuggling and clandestinely introducing into the United States certain merchandise on which there are duties imposed by law, and which should be invoiced, with intent to defraud the revenue of the United States, to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five ($5.00) Dollars per proof gallon imposed by law; and other quantities of spirituous liquors and wines, the exact amounts thereof being to the Grand Jurors unknown, without invoicing said merchandise and without paying the said duties thereon and without making provision for the payment of the said duties; in violation of Section 593 of the Tariff Act of 1922: and

The crime of knowingly, willfully, unlawfully and feloniously receiving, concealing, selling and facilitating the sale, transportation and concealment of the hereinbefore described merchandise, which said merchandise prior thereto had been imported into the United States contrary to law, that is to say, the said defendants would knowingly, wilfully, unlawfully and feloniously receive, conceal, sell and facilitate the sale, transportation and concealment of the said merchandise, after the same had been

smuggled and clandestinely introduced into the United States *into the United States* in the gasolene power boat Erni, from a point without the boundaires of the United States, to-wit: the town of Mazatlan in the Republic of Mexico, without any permit being issued therefor, [13] under the provisions of the National Prohibition Act to so import the said merchandise and without having been invoiced and without having the duties thereon paid, and without any provisions having been made for the payment of said duties, said defendants well knowing that the said merchandise had been so imported contrary to law, in violation of the provisions of Section 593 of the Tariff Act of 1922;

The said conspiracy, combination, confederation and agreement was continuously throughout all of the times in this Indictment mentioned, and up to the time of the filing of this Indictment, in operation and existence. [14]

Overt Act. No. 1

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 10th day of February, A. D. 1924, the said defendant Francis C. Neal drove in a certain Cadillac roadster automobile to a point near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesiad, and within the jurisdiction of the United States and of this honorable court, the said point being near the entrance to the Malibu ranch.

Overt Act No. 2

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy, and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Francis C. Neal, W. S. D. Smith, and F. Carlton proceeded in a certain Essex roadster automobile to the Malibu Pier, near the city of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court;

Overt Act No. 3

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D., 1924, the said defendants, Anna Neal turned off and on the lights of a certain Cadillac automobile, at a point within the Malibu Ranch, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States [15] and of this Honorable Court.

Overt Act No. 4

And the Grand Jurors aforesiad, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the

said defendant William Morrison proceeded to a point near the Malibu Ranch near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 5

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendant William Morrison, proceeded from the said point near the Malibu Ranch to the top of a rise of ground, within the boundaries of the Malibu Ranch, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 6

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 25th day of January, A. D. 1924, the said defendants, Frank Oreb, Nick Zanetich, H. E. F. Greenwald, Tom Dusevich and James Yubanni proceeded from Mazatlan within the Republic of Mexico to a point within the jurisdiction of the United States, at or near [16] Santa Monica, County of Los Angeles, within the state, division and district

aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 7

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Frank Oreb, Nick Zanetich, H. E. F. Greenwald, Tom Dusevich and James Yubanni proceeded, on board the gasolene power boat Erni to the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 8

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendants, Francis C. Neal, W. S. D. Smith, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich and James Yubanni, unloaded from the gasolene power boat Erni about two hundred and thirty (230) gallons of whiskey onto the said Malibu Pier located near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court. [17]

Overt Act No. 9

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924, the said defendant Frank Oreb climbed from the said gasolene power boat Erni to the Malibu Pier, which said pier is located near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Overt Act No. 10

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That thereafter, in furtherance of the said conspiracy and to effect the object thereof, and on or about the 11th day of February, A. D. 1924 the said defendants, W. S. D. Smith, H. E. F. Greenwald, Nick Zanetich, Tom Dusevich and James Yubanni attempted to put to sea aboard the gasolene power boat Erni from a point near the Malibu pier near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court.

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [18]

SECOND COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further present:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true names of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of February, A. D. 1924 at the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniously and with intent to defraud the revenues of the United States, smuggle and clandestinely bring into the United States from the Republic of Mexico, certain goods, wares and merchandise, to-wit: spirituous liquors more fully described as follows, to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five ($5.00) Dollars per proof gallon imposed by law, and which said spirituous liquors were then and there subject to said duty by law; which said spirituous liquors should have been invoiced, [19]

without then and there paying or accounting for said duty or any part thereof, and without having said distilled spirits or any part thereof invoiced; in violation of Section 593 of the Tariff Act of 1922;

Contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [20]

THIRD COUNT

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further *per*sent:

That Francis C. Neal, W. S. D. Smith, Anna Neal, F. Carlton, H. E. F. Greenwald, Nick Zanetich, Frank Oreb, Tom Dusevich, James Yubanni and William Morrison, hereinafter called the defendants, whose full and true names are, and the full and true name of each of whom is, other than as herein stated, to the Grand Jurors unknown, each late of the Southern Division of the Southern District of California, heretofore, to-wit: on or about the 11th day of February, A. D. 1924, at the Malibu Pier, near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesi*a*d, and within the jurisdiction of the United States and of this Honorable Court, did knowingly, willfully, unlawfully and feloniusly and for beverage purposes and contrary to law, smuggle and clandestinely bring, import and introduce into the United States to-wit: the State of California, at the County of Los Angeles, and within the jurisdiction of this Honorable Court, from a foreign

country, to-wit: the Re*b*public of Mexico, certain goods, wares and merchandise, to-wit: spirituous liquors more fully described as follows: to-wit: about one thousand and fifty (1050) gallons of spirituous liquors more particularly described as follows, to-wit: about seven hundred and fifty (750) gallons of alcohol and about three hundred (300) gallons of whiskey, on which there is a duty of Five ($5.00) Dollars per proof gallon imposed by law, said spirituous liquors then and there containing [21] alcohol in excess of one-half of one per cent by volume, the importation of which said distilled spirits into the United States was then and there forbidden except on a permit issued therefor by the Commissioner of Internal Revenue of the United States, without having first obtained a permit from the said Commissioner of Internal Revenue of the United States to import and bring the said spirituous liquors into the United States, that is to say, the said defendants did knowingly, wilfully, unlawfully and feloniously and without first obtaining a permit from the *S*ommissioner of Internal Revenue of the United States, transport and clandestinely smuggle, carry and convey the said *the said* quantity of spirituous liquors on board the gasolene power boat Erni across the International Boundary Line from the Republic of Mexico into the United States at a point near the City of Santa Monica, County of Los Angeles, within the state, division and district aforesaid, in violation of Sections 593 and 813 of the Tariff Act of 1922;

Contrary to the form of the statute in such case

made and provided, and against the peace and dignity of the United States of America.

JOSEPH C. BURKE
United States Attorney
(s) MARK L. HERRON
Assistant United States Attorney. [22]

(Cover Page)

No. 6310 M

United States District Court
Southern District of California

THE UNITED STATES OF AMERICA,

vs.

FRANCIS C. NEAL, et al.

INDICTMENT

Viol: Sec. 37 F.P.C. Conspr. to viol. Tariff Act of 1922 and Secs. 593 and 813 of Tariff Act of 1922.

A TRUE BILL
/s/ R. W. RICHMAN (?)
Foreman

Presented and filed in open Court, this .....day of Feb 29 1924 A.D. 190

CHAS. N. WILLIAMS,
Clerk

By ..... ? .....Deputy Clerk

F. C. Neal and W.D.S. Smith $20,000 ea
Anna Neal $2,500
All other Defts $5,000 ea. [23]

At a stated term, to wit: The January Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday the 17th day of March in the year of Our Lord one thousand nine hundred and twenty four.

Present:

The Honorable Paul J. McCormick District Judge.

No. 6310-T Crim. S. D.

[Title of Cause.]

This cause coming on at this time for arraignment and plea of all defendants herein except James Yubanni; Mark L. Herron, Assistant United States Attorney, appearing as counsel for the Government; all of the above entitled defendants being present except F. Carlton who is a fugitive from justice and James Yubanni; and defendants who are present being represented by Mack Meader, Esq. and said defendants having been called, waive the reading of the Indictment and state their names to be as given therein, and, upon being required to plead, all defendants who are present interpose their separate pleas of not guilty, and Mack Meader, Esq. having thereupon asked that this cause be transferred to Judge Bledsoe's Department for trial for April 8th, 1924 and that this cause be continued to said date for arraignment and plea of

defendant James Yubanni, Mack Meader, Esq. appearing for said defendant James Yubanni, at this time, it is by the court ordered that this cause be transferred to Judge Bledsoe's Department for trial of said defendants for April 8th, 1924 and for the arraignment and plea of defendant James Yubanni for said time. [24]

No. 6310-T-B-Cr.

[Title of District Court and Cause.]

We, the Jury in the above entitled cause, find the defendant, Francis C. Neal, Guilty, as charged in the First Count of the Indictment, and Guilty as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, W. S. D. Smith, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty as charged in the Third Count of the Indictment; and the defendant, Anna Neal, Guilty, as charged in the First Count of the Indictment, and Not Guilty as charged in the Second Count of the Indictment, and Not Guilty, as charged in the Third Count of the Indictment; and the defendant, H. E. F. Greenwald, Guilty, as charged in the First Count of the Indictment, *and Guilty,* and Guilty as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, Nick Zanetich, Guilty, as charged in the First Count of the Indictment, and Guilty

as charged in the Second Count of the Indictment, and *Guilty,* Guilty, as charged in the third Count of the Indictment; and the defendant, Frank Oreb, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant Tom Dusevich, Guilty, as charged in the First Count of the Indictment, and Guilty, as charged in the Second Count of the Indictment, and Guilty, as charged in the Third Count of the Indictment; and the defendant, William Morrison, Not Guilty, as charged in the First Count of the Indictment, and Not Guilty, as charged in the Second Count of the Indictment, and Not Guilty, as charged in the Third [25] Count of the Indictment.

Los Angeles, California, April 22, 1924.
/s/ ELLWOOD DeGARMO,
Foreman.

Filed: April 22, 1924.
CHAS. N. WILLIAMS,
Clerk.
/s/ EDMUND L. SMITH,
Deputy. [26]

At a stated term, to wit: The January Term, A. D. 1924 of the District Court of the United States of America, within and for the Southern Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Friday the 25th day of April in the year of

Our Lord one thousand nine hundred and twenty four.

Present:

The Honorable Benjamin F. Bledsoe, District Judge.

No. 6310-B Crim. S. D.

[Title of Cause.]

This cause coming before the court at this time for sentence of defendants Francis C. Neal, Anna Neal, W. S. D. Smith, Frank Oreb, H. E. F. Greenwald, Nick Zanetich and Tom Dusevich; Mark L. Herron, Esq. Assistant United States Attorney, appearing as counsel for the Government, defendants Francis C. Neal and Anna Neal being present in court with their attorneys, C. B. Morton, Esq. and Wm. J. Clark, Esq.; defendants W. S. D. Smith, H. E. F. Greenwald, Nick Zanetich, Frank Oreb and Tom Dusevich being present in court with their attorney Mack Meader, Esq.; J. E. Noon being also present in court in his official capacity as stenographic reporter of the testimony and proceedings, Wm. J. Clark, Esq. presents a motion for a new trial and Mack Meader, Esq. having thereupon presented a motion for a new trial on behalf of their clients, without argument, it is by the court ordered that said motions for a new trial be and they are hereby overruled, and exceptions having thereupon been entered to the overruling of said motions on behalf of the defendants, Mark L. Herron, Esq. makes a statement to the court on

behalf of the Government, and Wm. J. Clark, Esq. having thereupon made a statement to the court on behalf of defendants Francis C. Neal and Anna Neal, the court now pronounces sentence upon defendants for the crime of which [27] they now stand convicted, namely, violation of Section 37 Federal Penal Code, conspiracy to violate Tariff Act of 1922 *and Tariff Act of 1922,* and it is the judgment of the court that the defendant W. S. D. Smith be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and to pay a fine unto the United States in the sum of $10,000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine of $1.00 on each of the second and third counts, respectively; and that the defendant Frank Oreb be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of two years on each count of the Indictment, said terms of imprisonment to be*ing* and run concurrently, and to pay a fine in the sum of $1000.00 on the first count of the Indictment, and stand committed to said United States Penitentiary until said fine shall have been paid, and to pay a fine of $1.00 on each of the second and third counts, respectively; and that the defendant Francis C. Neal, be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period *for* fifteen months on each count of the

Indictment, said terms of imprisonment to begin and run concurrently, and to pay a fine in the sum of $100.00 on the first count of the Indictment, and stand committed to said United States Penitentiary until said fine shall have been paid, and pay a fine of $1.00 on each of the second and third counts, respectively; and that the defendant Anna Neal pay a fine in the sum of $1.00; that the defendant H. E. F. Greenwald be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and pay a fine in the sum of $1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the [28] sum of $1.00 on each of the second and third counts, respectively; and that defendant Nick Zanetich be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of imprisonment to begin and run concurrently, and pay a fine in the sum of $1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the sum of $1.00 on each of the second and third counts, respectively; and that defendant Tom Dusevich be imprisoned in the United States Penitentiary at Leavenworth, Kansas, for the term and period of eighteen months on each count of the Indictment, said terms of im-

prisonment to begin and run concurrently, and pay a fine in the sum of $1000.00 on the first count of the Indictment and stand committed to the said United States Penitentiary until said fine shall have been paid, and to pay a fine in the sum of $1.00 on each of the second and third counts, respectively; and that said defendants be remanded to the custody of the United States Marshal. [29]

United States of America—ss.

The President of the United States of America,
To the Honorable the Judges of the District Court of the United States for the Southern District of California, Southern Division

Greeting:

Whereas, lately in the District Court of the United States for the Southern District of California, Southern Division before you, or some of you, in a cause between United States of America, Plaintiff, and Francis C. Neal; W. S. D. Smith; Anna Neal; F. Carlton (fugitive); H. E. Greenwald; Nick Zanetich, Frank Oreb; Tom Dusevich; James Yribane, charged as James Yubanni and William Morrison, Defendants, No. 6310-T (b) Crim. S. D. a Judgment was duly entered on the 25th day of April, A. D. 1924; which said Judgment is of record and fully set out in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and [30] as by the inspection of the Transcript of the Record.....

of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of a writ of error prosecuted by W. S .D. Smith, H. E. F. Greenwald, Nick Zametich, Frank Oreb and Tom Dusevich, as Plaintiffs in Error, against United States of America, as Defendant in Error.....

.....

.....

agreeably to the Act of Congress.....
in such cases made and provided, fully and at large appears: .....

And Whereas, on the 24th day of November in the year of our Lord One Thousand Nine Hundred and twenty-five the said cause.....
came on to be heard before the said Circuit Court of Appeals, on the said.....
Transcript of the Record and was duly argued and submitted: .....

[31]

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is affirmed.

(December 14, 1925.)

You, Therefore, Are Hereby Commanded

That such further proceedings be had in the said cause .....
as according to right and justice and the laws of the United States ought to be had, the said writ of

error as to Plaintiffs in Error, Smith, Greenwald, Zanetich and Lusevich, notwithstanding.

Witness, the Honorable William H. Taft, Chief Justice of the United States, the 15th day of March, in the year of our Lord One Thousand Nine Hundred and twenty-six and of the Independence of the United States of America the One Hundred and fiftieth.

F. D. MONCKTON,
Clerk of the United States
Circuit Court of Appeals
for the Ninth Circuit.

By /s/ PAUL P. O'BRIEN,
Deputy Clerk.

[Endorsed]: Filed March 30, 1943. [32]

United States Circuit Court of Appeals for the Ninth Circuit

No. 4471

SMITH, et al.,

vs.

UNITED STATES OF AMERICA.

MANDATE

As to Smith, Greenwald, Zanetich and Lusevich

No. 6310—B Crim.

U. S. District Court

Southern District of California

UNITED STATES OF AMERICA

vs.

FRANCIS C. NEAL, W. S. D. SMITH, et al.

[Endorsed]: Filed Mar. 18, 1926. Chas. N. Williams, Clerk. [33]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 343

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. D. SMITH,

Defendant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause coming on regularly for hearing on the 12th day of May, 1943, the plaintiff being represented by J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant being represented by Stanley J. Padden and Charles P. Moriarty, an agreed statement of facts having been stipulated by both the plaintiff and the defendant, a trial having been held on the merits, and the Court, in accordance with the stipulation as filed, finds the following facts:

FINDINGS OF FACT

I.

That the defendant W. S. D. Smith, while a resident of the State of California, was indicted by the Grand Jury of the United States District Court for the Southern District of California on February 29th, 1924. That the indictment consisted of

three counts, Count I being a conspiracy count, Count II being a violation of Sec. 593 of the Tariff Act of 1922, Count III being a violation of Secs. 593 and 813 of the Tariff Act of 1922.

II.

That to each count of the indictment the defendant W. S. D. Smith entered a plea of not guilty. Thereafter a trial was had, and [34] the defendant W. S. D. Smith was convicted on the conspiracy count and all the other counts of the indictment. That thereafter on April 25, 1924, W. S. D. Smith was duly and regularly sentenced, the sentence providing that the defendant W. S. D. Smith serve two years at the United States Penitentiary at Leavenworth, Kansas, and pay a fine of $10,000.00 imposed on the conspiracy count, and a fine of $1.00 on each of the other counts of the indictment. That the said W. S. D. Smith served two years in the United States Penitentiary at Leavenworth, Kansas; and after completion of his sentence, being without funds and unable to pay the fine of $10,000.00, he duly and regularly executed the pauper's oath and served an additional thirty days, and was discharged from the penitentiary upon the termination of said thirty day period.

III.

That thereafter an execution issued on said judgment and sentence imposing a fine of $10,000.00 on Count I of the indictment, and a fine of $1.00 on each of the other counts of the indictment, said

execution being issued from the District Court of the United States for the Southern District of California, and from such execution the sum of $51.35 was realized thereon, and no more. That save and except the said sum of $51.35 realized from the garnishment proceedings above, no further sums have been paid by the defendant W. S. D. Smith to apply upon said fine.

IV.

That with the exception of the aforesaid execution, no further execution has been issued and no further proceedings were held until the filing of the above entitled action in this Court. In the year 1928 the defendant W. S. D. Smith migrated to Seattle, Washington from California and entered business under his own name [35] in the City of Seattle, County of King, State of Washington, and is now, and was at the commencement of this action, a resident of the City of Seattle, within the Northern Division of the Western District of Washington.

Done in open Court this 31 day of May, 1943.

JOHN C. BOWEN,
United States District Judge.

And as Conclusions of Law from the foregoing Findings of Fact, the Court finds the following:

CONCLUSIONS OF LAW

I.

That this Court has jurisdiction over the defendant W. S. D. Smith and the cause of action.

II.

That there is due and owing from the defendant W. S. D. Smith to the United States of America $9950.65, being the balance due of the fine imposed by the District Court of the United States for the Southern District of California on April 25th, 1924.

III.

That this action was instituted for the purpose of obtaining judgment in this District based upon the judgment as heretofore rendered in the Southern District of California as aforesaid, and the Court finds that following the decisions of the Supreme Court of the United States in the case of Custer v. McCutcheon, 283 U. S., at pg. 514, and the case of Schodde, et al, v. United States, 69 Fed. (2d), at pg. 866, that the plaintiff is entitled to judgment for said amount above named.

Done in open Court this 31 day of May, 1943.

JOHN C. BOWEN,
United States District udge.

[36]

Presented by:

J. CHARLES DENNIS,
United States Attorney.

Approved as to form only:

STANLEY J. PADDEN,
CHARLES P. MORIARTY.

[Endorsed]: Filed May 31, 1943. [37]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 343

UNITED STATES OF AMERICA,

Plaintiff,

vs.

W. S. D. SMITH,

Defendant.

JUDGMENT

This cause coming on regularly for hearing in open Court this 31st day of May, A. D. 1943, the plaintiff being represented by J. Charles Dennis, United States Attorney for the Western District of Washington, the defendant W. S. D. Smith being represented by Stanley J. Padden and Charles P. Moriarty, his attorneys, the trial of the action having been held upon the merits, the Court having signed Findings of Fact and Conclusions of Law based thereon, now, therefore, it is hereby

Ordered, Adjudged and Decreed that the plaintiff United States of America do have and recover from the defendant W. S. D. Smith the sum of Nine Thousand Nine Hundred Fifty Dollars and Sixty-five cents ($9950.65), together with the costs of this action.

Done in open Court this 31st day of May, 1943.

JOHN C. BOWEN,
United States District Judge.

Presented by:

J. CHARLES DENNIS,
United States Attorney.

Approved: as to form only:

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
Attorney for Defendant.

[Endorsed]: Filed May 31, 1943. [38]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that W. S. D. Smith, defendant above names, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on May 31, 1943.

CHARLES P. MORIARTY
STANLEY J. PADDEN
Attorneys for Appellant
W. S. D. Smith.

Received a copy of the within Notice of Appeal this 8th day of July 1943.

J. CHARLES DENNIS,
Attorneys for U. S.

[Endorsed]: Filed July 8, 1943 [39]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, Judson W. Shorett, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages *number* from 1 to 45 inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by the designation of the record on appeal filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court at Seattle, and that the same constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that no exhibits are shown of record as having been offered or admitted at the trial of the above entitled cause.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate of return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerk's fees (Act February 11, 1925) for making record, certificate of return, 2 folios at .05c	.10
and 96 folios as .15c	14.40
Appeal fee, (Sec. 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Total	$20.00

[46]

I further certify that the foregoing fees have been paid by the attorney for the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 10th day of August, 1943.

[Seal] JUDSON W. SHORETT,
Clerk
By TRUMAN EGGER
Chief Deputy [47]

[Endorsed]: No. 10523. United States Circuit Court of Appeals for the Ninth Circuit. W. S. D. Smith, Appellant, vs. United States of America Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed August 13, 1943.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
For the Ninth Circuit

No. 10523

UNITED STATES OF AMERICA,
Plaintiff and *Appelle,*

vs.

W. S. D. SMITH,
Defendant and Appellant.

STIPULATION

It Is Hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the parts of the record necessary to be printed for consideration of the points on appeal by the court are the following:

The complaint, original certified record page 2.

The amended answer, the original certified record page 6.

The agreed statement of facts with the exhibits attached thereto, original certified record page 8.

The findings of fact and conclusions of law, original certified record page 34.

The judgment, original certified record page 38.

Notice of appeal, original certified record page 39.

And it is hereby agreed that these documents may constitute the record on appeal and the other documents consisting of the

Answer, original certified record page 4.

Cost Bond on appeal, original certified record page 40.

A designation and the context of the record, original certified record page 45.
need not be printed.

This stipulation is made pursuant to rule 19 (CCA9) and it is agreed between the attorneys for the respective parties that the printing of any other records are not necessary for the consideration by the court, but agree that either party may supplement the record if such are deemed necessary for consideration.

CHARLES P. MORIARTY
STANLEY J. PADDEN
Attorneys for Appellant
J. CHARLES DENNIS
Attorney for *Appelle*

[Endorsed]: Filed Aug 13, 1943

[Title of Circuit Court of Appeals and Cause.]

STATEMENT OF POINTS RELIED UPON BY THE APPELLANT

The following is the statement of points on which the appellant intends to rely on their appeal from that certain judgment entered by the United States District Court for the Western District of Washingon against W. S. D. Smith.

I.

The court erred in finding that the judgment

entered April 25, 1924, in the U. S. District Court of California was a valid and subsisting judgment at the time of the commencement of this action and a valid and subsisting judgment on April 1, 1941 at time of the commencement of this action.

II.

The court erred in making the following conclusions of law:

1. Holding it had jurisdiction over the defendant and cause of action.

2. Court erred in making conclusions of law #2 that W. S. D. Smith was indebted to the United States of America in the sum of $9950.65, on account of the judgment entered April 25, 1924.

The court erred in Conclusion of law that the cases of Custer vs. McCutcheon 283 U. S. page 514 and the case of Schodde et al vs. the United States 69 Fed. (2) page 866 were applicable to the Cause of Action and entitled the plaintiff the right to judgment against the defendant.

III.

That District Court erred in failing to apply the Statute of Limitations Title 28, U. S. C. A., Section 791, reading as follows:

"No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or for-

feiture accrued * * *."

and in holding that the fine was not a penalty under wording of the Statute.

IV.

The court erred in failing to hold rule 30 of the local rules of the United States District Court for the Western District of Washington was applicable to the cause of action and covered by the Statutes of the State of Washington, to-wit:

"Except where regulated by Acts of Congress or the Federal Rules of Civil Procedure, the party recovering judgment in any cause in the District Court shall be entitled to similar remedies upon the same by execution, or otherwise, to reach the property of the judgment debtors as are provided at the time in like causes by the laws of the State of Washington; and the State laws in relation to executions, sales, exemptions, rights of purchasers, rights of judgment creditors, and judgment debtors, redemptions, liens of judgments and proceedings supplementary to such proceedings, existing at the time the remedy is sought, subject to the Acts of Congress and said Federal Rules of Civil Procedure, are adopted as rules of this court; and the United States Marshal of this District shall conform his proceedings thereto."

V.

The court erred in failing to apply the following U. S. Statute to the Cause of Action.

"Section 1621. Limitation of actions.—No suit or action to recover any pecuniary penalty or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offence was discovered: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (June 17, 1930, c. 497, Title IV, §621, 46 Stat. 758; Aug. 5, 1935, c. 438, Title III, §306, 49 Stat. 527.)"

VI.

The court erred in failing to apply the California Statutes of Limitation to the Cause of Action of the plaintiff.

VII.

The court erred in failing to apply the Washington Statutes of Limitation to the Cause of Action of the plaintiff.

VIII.

The court erred in ruling that the fine was not a penalty under the Statute and the District court erred in entering judgment against W. S. D. Smith in the sum of $9950.65 together with costs of the

action and in entering any judgment against W. S. D. Smith at all.

CHARLES P. MORIARTY
STANLEY J. PADDEN
Attorneys for Appellant

Received a copy of the within Statement of Points this 10th day of Aug. 1943.

J. CHARLES DENNIS
Attorney for U. S.

[Endorsed]: Filed Aug. 13, 1943.

No. 10523

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

W. S. D. SMITH,
Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT W. S. D. SMITH

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
MELVIN T. SWANSON,
PADDEN & MORIARTY,
Attorneys for Appellant.

1212 American Building,
Seattle, Washington.

THE ARGUS PRESS, SEATTLE

No. .....

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

W. S. D. SMITH,
Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLANT
W. S. D. SMITH

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BRIEF OF APPELLANT W. S. D. SMITH

I. STATEMENT OF JURISDICTIONAL FACTS

The bill of complaint filed by the appellee is a suit of a civil nature brought by the United States of America as Plaintiff, in an action upon a judgment secured in a penal proceeding, and the matter in controversy exceeds exclusive of interest and cost the sum of Three Thousand ($3000.00) Dollars.

Jurisdiction on the United States District Court rests upon Article III of Section II Clause 1 of the United States Constitution and Judicial Code Section 24 as amended.

Notice of appeal was timely filed and the requirements of the rules complied with. The jurisdiction of

the United States Circuit Court of Appeals depends upon the Judicial Code Section 128 as amended.

II. STATEMENT OF THE CASE

The appellant, W. S. D. Smith, was convicted with other defendants on February 29th, 1924, in the United States District Court of California upon an indictment charging conspiracy to violate the United States Custom Laws and the National Prohibition Act, and on other substantive counts charging law violations. All of the counts appear in the transcript (Tr. 10). On April 25th, 1924, Smith was sentenced to serve two years in prison and to pay a fine of Ten Thousand ($10,000.00) Dollars. On each of the other counts, he was fined one ($1.00) Dollar. The judgment provided in connection with the fines that "the defendant should be committed to the United States until said fine be paid (Tr. 25)." Thereafter execution was issued on the judgment in California and the amount of Fifty-one and 35/100 ($51.35) Dollars was realized thereon. Smith served his penitentiary sentence and being without funds executed the pauper's oath and served an additional thirty days and was then discharged from custody. Thereafter, Smith migrated to Seattle in 1928 and became and is now a permanent resident thereof. No further action was taken on the judgment until nearly seventeen years after its entry, when this action was commenced. It was filed at Seattle on April 1st, 1941. It is the contention of the appellant that under the laws of the United States, the State of California and the State of Washington, the judgment cannot be enforced be-

cause of the limitations provided for in the statutes. It is further suggested that it would be inequitable for the government to be permitted to recover Judgment and have execution upon the property acquired by a party after he has paid the penalty for his violation.

III. SPECIFICATIONS OF ERROR

1. The Court erred in failing to apply to the cause of action the limitations on suits for penalties and forfeiture provided in Title 28, U.S.C.A. 791.

2. The Court erred in failing to apply the Statutes of the State of Washington to the cause of action.

3. The Court erred in failing to hold the action was extinguished or limited by the laws of California.

4. The Court erred in holding certain cases govern the cause of action.

5. The Court erred in ruling that a fine was not a penalty.

6. The Court erred in entering Judgment against appellant.

The foregoing are the substance of the statement of the points relied upon by appellant (Tr. 40).

IV. SUMMARY OF THE ARGUMENT

This action is based on a judgment seventeen years old. The laws of the United States forbid suits or prosecutions for penalties for forfeiture, pecuniary or otherwise, accruing under the laws of the United States unless the same is commenced within five years, and the fine imposed by the judgment is a penalty, and the fact that it was reduced to a judg-

ment in California does not alter its character. The laws of California prohibit actions upon a judgment of any court of the United States to five years and actions upon penalties to one year. The laws of the State of Washington limit actions upon any judgment to a period of six years, and further provide that at the expiration of six years, the lien of any judgment shall cease. The rules of court for the Western District of Washington adopt the laws of the State of Washington in connection with judgments and the General Rules for District Courts also adopt such state statutes. The United States statute 569 provides the method by which fines may be collected and enforced and provides that the same may be enforced by execution in like manner as judgments in civil cases are enforced. There are no provisions for renewal of judgments. The several Statutes of Limitations were raised by defendant's answer. It is the contention of the appellant that the defendant has satisfied the terms of the penal judgment by service of two years in prison and by the application of all property he had at the time to satisfaction of the fine, and further satisfied the judgment by the service as a pauper of the additional thirty days required by law. It is to be noted the government makes no claim that the appellant was not a pauper at the time of his release (Tr. 8). We believe that the government is not now entitled at this late date to demand from the appellant property he has accumulated since his release from prison which is not connected in any way with his original dereliction. As the basis for this statement, we quote in the classic words of Chief Justice Marshall, "This would

be utterly repugnant to the genius of our laws. In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture."

V. ARGUMENT ON THE MERITS

We believe that the following statute is controlling upon the court:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specifically provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued."
>
> Title 28, U.S.C.A., Sec. 791.

The specifications of error are so interwoven, we find it difficult to find a dividing line between them, and we find it necessary to discuss them generally, but we have endeavored to separate some of the various points.

It is apparent that if this action is for a penalty or forfeiture, then the government cannot maintain it. There can be no question that the term "penalty" has from the beginning of our jurisprudence involved the idea of punishment for infraction of law and is commonly used to describe the method by which laws are enforced against wrongdoers. In our opinion, if the sentence imposed read a penalty of $10,000.00, it would be just the same punishment as "a fine of $10,000.00," because as we will show later, the word

penalty includes a fine, and to attempt to say the statute quoted, is not applicable, is to say that it is not a penalty. The term penalty is so all inclusive that it would be as proper to argue that a part is not a component part of the whole, although the whole is the sum of the parts; or that the chemical compounds which made up a product are not included in the product as to say even to the layman that a fine is not a penalty of the law.

Is a Fine a Penalty or Forfeiture?

In support of our position that a fine is a penalty, we quote the following:

> "The term penalty in its broadest sense includes all punishment of whatever kind and in its broadest sense it is a generic term which includes fines as well as other kinds of punishment. * * * While a fine is always a penalty, a penalty is not always a fine."
>
> 36 C.J.S. 781, 782.

We cite the following additional definitions for the Court's consideration:

> *Penalty*: "A sum, also called a fine, recoverable in a court of summary jurisdiction from a person infringing a statute; a sum recoverable by action from person infringing a statute."
>
> Wharton Law Lexicon (14th ed.) p. 751.
>
> "The terms 'fine,' 'forfeiture' and 'penalty' are often used loosely and even *confusedly*, but when a discrimination is made, the word 'penalty' is found to be *generic* on its character including both fine and forfeiture." (Italics ours)
>
> Black's Law Dictionary (3rd ed.) p. 1345.

Chief Justice Marshall has clearly made and defined the matter in the following observation:

> "Almost every fine or forfeiture under a penal statute, may be recovered by an action of debt as well as by information; and to declare that the *information was barred while action of debt was left without limitation*, would be to attribute a capriciousness on this subject to the legislature, which could not be accounted for; and to declare that the law did not apply to cases on which an action of debt is maintainable, would be to overrule express words, and to give the statute almost the same construction which it would receive if one distinct member of the sentence was expunged from it. In the particular case, the statute which creates the forfeiture does not prescribe the mode of demanding it; consequently, either debt or information would lie. It would be singular if the one remedy should be barred and the other left unrestrained." * * *
>
> "In expounding this law, it deserves some consideration, that if it does not limit actions of debt for penalties, those actions might, in many cases, be brought at any distance of time. This would be utterly repugnant to the genius of our laws. *In a country where not even treason can be prosecuted after a lapse of three years, it could scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.*" (Italics ours)
>
> *Adams v. Woods*, Cranch 2 (U.S.) 336, 2 L. ed. 297.

We might observe that if the government's contention is correct, the appellant having been punished by imprisonment for his unlawful actions would continue

for his lifetime liable to the United States for his fine. This would in reality, because of the continuing economic burden, be more severe than the loss of liberty for a period.

Justice Lamar, in answering to a certificate of division of opinion from the Circuit Court as to whether a crime was included in a definition, made a pertinent observation:

> "The only ground upon which the correctness of this interpretation may be doubted is, that the words 'penalty,' 'liability' and 'forfeiture' do not apply to crimes and the punishments therefor, such as we are now considering. We cannot assent to this. These words have been used by the great masters of Crown Law and the elementary writers as synonymous with the word punishment, in connection with crimes of the highest grade. Thus, Blackstone speaks of criminal law as that 'branch of jurisprudence which teaches of the nature, extent and degrees of every crime, and adjusts to it its adequate and necessary penalty.' Alluding to the importance of this department of legal science, he says: 'The enacting of penalties to which a whole nation shall be subject should be calmly and maturely considered.' Referring to the unwise policy of inflicting capital punishment for certain comparatively slight offenses, he speaks of them as 'these outrageous penalties,' and repeatedly refers to laws that inflict the 'penalty of death.' He refers to other Acts prescribing certain punishments for treason as 'Acts of pains and penalties.' "
>
> *U. S. v. Reisinger*, 128 U.S. 398, 32 L. ed. 480.

Even when the word "tax" has been used, but the

intent is a penalty, the court has recognized the penal character of the action and observed:

> "* * * A tax is an enforced contribution to provide for the support of government; as the word is here used, is an exaction imposed by statute as punishment for an unlawful act. The two words are not interchangeable, one for the other. *No mere exercise of the art of lexicography can alter the essential nature of an act or a thing; and if an exaction be clearly a* penalty it cannot be converted into a tax by the simple expedient of calling it such. That the exaction here in question is not a true tax, but a penalty involving the idea of punishment for infraction of the law, is settled by *Lipke v. Lederer*, 259 U.S. 557, 561, 562, 66 L. ed. 1061, 1064, 1065, 42 S. Ct. 549.
>
> "See also *Regal Drug Corp. v. Wardell*, 260 U.S. 386, 67 L. ed. 318, 43 S. Ct. 152.
>
> "* * * *But an action to recover a penalty for an act declared to be a crime, is, in its nature, a punitive action; and the word 'prosecution' is not inapt to describe such an action.*" (Italics ours)
>
> *United States v. LaFrance*, 282 U.S. 568, 75 L. ed. 551.

It is not out of place to observe that this action is the first brought by the government in this district, or in any other district so far as our search has been able to ascertain, and the government until now has apparently interpreted the limitation statute on penalties as applying to cases of this character. We state this opinion because of the thousands of cases created during the prohibition period when many fines

and penalties were imposed and yet, we are unable to find an adjudicated case wherein the government has sought to recover on it after the five year period.

We might at this point observe that this is a civil action for debt although the criminal action upon which it is based, was complete within itself.

In a case where the government attempted to ground an action for a debt upon a smuggling statute, relief was denied in the following language:

> "That Act contemplated a criminal proceeding, and not a civil action of debt. It imposed a penalty for receiving, concealing, buying, selling or in any manner facilitating the transportation, concealment or sale of goods illegally imported. *The penalty was a fine* on conviction, not exceeding $5,000.00 nor less than $50.00, or imprisonment, or both, at the discretion of the court. It is obvious, therefore, that its provisions cannot be enforced by any civil action, certainly not in an action of debt." (Italics ours)
>
> *United States v. Claflin*, 97 U.S. 546, 24 L. ed. 1082.

In the cited case, the court further said, in referring to imprisonment which has been added to the new statute, the following:

> "The latter statute imposed a greater penalty and added imprisonment for the same offense."

The only difference in the cited case and the situation of the appellant appears to be that the government is now endeavoring to use the old criminal proceeding to base a new action of debt, instead of grounding it upon the criminal statute.

A Fine Is Always a Penalty Although a Penalty Is Not Always a Fine.

Penalty is a generic term, it has been applied to civil and criminal proceedings. It has been held to include both fine and forfeiture, but it generally has been understood as an exaction demanded by the state for an infraction of its laws. The father of our jurisprudence placed it in the criminal branch and the profession generally has spoken of the "Penalty of the law" when referring to the punishment inflicted upon a wrongdoer. A fine certainly is punishment. Imprisonment is also punishment. The appellant was sentenced to these penalties. How can it be said which part of his sentence was a penalty and which part was not penalty. The Judgment was his penalty. We do not desire to burden the Court with extensive quotations, but content ourselves with the following cases which support our contention that "a fine is always a penalty, although a penalty is not always a fine."

Lipke v. Lederer, 259 U.S. 557, 42 S. Ct. 549, 66 L. ed. 1061;

Regal Drug Corp. v. Wardell, 260 U.S. 386, 43 S. Ct. 152, 67 L. ed. 318;

Huntington v. Attrill, 146 U.S. 657, 13 S. Ct. 224, 36 L. ed. 1123;

St. Louis, I. M. & S. R. Co. v. Williams, 251 U.S. 63, 40 S. Ct. 71, 64 L. ed. 139;

Loucks v. Standard Oil Co., 224 N.Y. 99, 120 N.E. 198;

Nash v. United States, 229 U.S. 373, 33 S. Ct. 780, 57 L. ed. 1232;

Life & Casualty Ins. Co. v. McCray, 291 U. S. 566, 78 L. ed. 987;

U. S. v. Constantine, 296 U.S. 287, 80 L. ed. 233;

United States v. Smith, Kline & French Co. (D.C.) 184 Fed. 532;

U. S. v. Springer & Lotz, 4 F. Supp. 253;

Schick v. U. S., 195 U.S. 65, 49 L. ed. 99;

U. S. v. Tsokas, 163 Fed. 129;

U. S. v. Moore, 11 Fed. 248;

State ex rel. Jones v. Howe (Mo.) 166 S. W. 328;

State v. McConnell (N.H.) 46 Atl. 458;

State v. Rose (Kan.) 97 Pac. 788;

Barkers Trust Co. v. State (Conn.) 114 Atl. 104;

U. S. v. Atlantic Fruits Co., 206 Fed. 440;

Poindexter v. State (Tenn.) 193 S.W. 126;

State v. Liggett & Myers Tobacco Co. (S. C.) 172 S.E. 857;

In re Dearborn Mfg. Corporation, 18 F. Supp. 763;

Senate Club v. Viley, 12 F. Supp. 982.

Statutes of Limitation in California and Washington Prohibit the Action.

The Chase California Code of Civil Procedure (1937) Part 2, Title 2, Chap. 3, Sec. 336, requires commencement of actions as follows:

> "Within five years: An action upon a judgment of any court of the United States or any state with limited statute."

The Washington Code provides as follows, Remington's Revised Statutes of Washington, Sec. 157:

> "Within six years:
>
> "1. An action upon a judgment or decree of any court of the United States, or of any state or territory within the United States, or of any territory or possession of the United States outside the boundaries thereof, or of any extraterritorial court of the United States * * *."

It is therefore our contention that the cause of action has been extinguished in both states and that neither the law of the forum nor the law of the place gives any right to the government to proceed.

We further contend that Rule 30 of the Local rules of the United States District Court prohibit the action. We quote in part therefrom:

> "Rule 30. Enforcing Judgment.
>
> "Except where regulated by Acts of Conress or the Federal Rules of Civil Procedure, the party recovering judgment in any cause in the district court shall be entitled to similar remedies upon the same by execution, or otherwise, to reach the property of the judgment debtor as are provided at the time in like causes by the laws of the State of Washington; and the state laws in relation to executions, sales, exemptions, rights of purchasers, *rights of judgment creditors* and judgment debtors, redemptions, liens of judgments and proceedings supplementary to such proceedings, existing at the time the remedy is sought, subject to the Acts of Congress and said Federal Rules of Civil Procedure, are adopted as rules of this court; and the United

States Marshal of this District shall conform his proceedings thereto;" (Italics ours)

It can be readily seen therefore that the United States Court is as limited in its jurisdiction as any State Court by its own rules and the Congressional mandate.

There are certain other laws of Washington which we believe are applicable and the court's construction of them is best expressed in the following case:

> "In Ch. 39, Laws of 1897, p. 52, relating to the duration of judgments, referring to sections of Remington's Compiled Statutes, we read:
>
> " '§459. After the expiration of six years from the rendition of any judgment it shall cease to be a lien or charge against the estate or person of the judgment debtor.
>
> " '§460. No suit, action or other proceedings shall ever be had on any judgment rendered in the state of Washington by which the lien or duration of such judgment, claim or demand, shall be extended or continued in force for any greater or longer period than six years from the date of the entry of the original judgment.'
>
> "This statute, we think, is not a mere statute of limitation affecting a remedy only. It is more than that. It not only makes a judgment cease to be a 'charge against the person or estate of the judgment debtor' after six years from the rendering of the judgment, but also in terms expressly takes away all right of renewal of or action upon the judgment looking to the continuation of its duration or that of the demand on which it rests, for a longer period than six years from the date of its rendition. It does not tell us when an action upon a judgment may be

commenced. It simply tells us that no judgment can be rendered extending the period of duration of a judgment, or of the claim or demand upon which it rests, beyond the period of six years following its rendition. We have given full force and effect to this statute. *Burman v. Douglas*, 78 Wash. 394, 139 Pac. 41; *Ball v. Bussell*, 119 Wash. 206, 205 Pac. 423. We note that in *Burman v. Douglas*, this statute is referred to as 'one of limitation.' A critical reading of that decision, however, will show that the question of whether it is an ordinary statute of limitation against the commencement of an action, or a statute taking away a right of action, was not considered. We think that expression in that decision should not be regarded as of any controlling force in our present inquiry.

"In *Ball v. Bussell, supra*, we held in effect that the statute took away all right of action for recovery upon a judgment in so far as such recovery could be made effectual beyond the period of six years from the rendition of the judgment."

Roche v. McDonald, 136 Wash. 322, 239 Pac. 1015, 44 A.L.R. 447.

It has been held that the duration of a lien of judgment rendered in Federal Court is controlled by State Law.

U. S. v. Harpootlian, 24 F.(2d) 646.

The Supreme Court of the United States On the Statute of Limitations.

The Supreme Court of the United States has made some pertinent observations in connection with the statute of limitations when the statutes of the

forum extinguished the cause of action. These cases are not cases involving the government's right to a cause of action, but indicate that when a cause of action is extinguished, there is no right to a remedy.

This was first decided in the case of *M'Elmoyle v. Cohen*, 13 Pet. 312, 10 L. ed. 177. This was followed later in the case of *Bank of Alabama v. Dalton*, which was an action brought on an Alabama judgment in the courts of Mississippi. The court, referring the plea of statute of limitation stated:

> "That acts of limitation furnish rules of decision, and are equally binding on the Federal courts as they are on State courts, is not open to controversy; the question presented is one of legislative power, and not practice.
>
> "In administering justice to enforce contracts and judgments, the States of this Union act independently of each other, and their courts are governed by the laws and municipal regulations of that State where a remedy is sought, unless they are controlled by the Constitution of the United States, or by laws enacted under its authority. And one question standing in advance of others is, whether the courts of Mississippi stood thus controlled, and were bound to reject the defense set up under the State law, because, by the supreme laws of the Union, it could not be allowed.
>
> "The Constitution declares, that 'full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved,

and the effect thereof.' No other part of the Constitution bears on the subject."

The Bank of the State of Alabama v. Dalton, 9 How. 522, 13 L. ed. 242.

This was later followed in the case of *Bacon v. Howard* which was a suit brought on a Mississippi judgment in the Texas court. Texas had a statute of limitations on judgments. The court ruled as follows:

"The Republic of Texas had the power to prescribe such rules to its own courts as best suited their condition, and their policy cannot be mistaken. Its accession to the Union had no effect to annul its Limitation Laws, or revive rights of action prescribed by its previous laws as an independent State. It is true, any legislation which denied that full faith and credit which the Constitution of the United States requires to be given to the judicial proceedings of sister States would be *ipso facto* annulled after the annexation, on the 29th of December, 1845. Thereafter, the authenticity of a judgment in another State, and its effect, are to be tested by the Constitution of the United States and Acts of Congress. But rules of prescription remain, as before, in the full power of every State. There is no clause in the Constitution which restrains this right in each state to legislate upon the remedy in suits or judgments of other states, exclusive of all interference with their merits. The case of *McElmoyle v. Cohen*, 13 Pet. 312, leaves nothing further to be said on this subject."

Bacon v. Howard, 20 How. 22, 15 L. ed. 811.

The foregoing cases, we believe, set forth the proper rule.

See also the oft cited case of

Fink v. O'Neil, 106 U.S. 272, 27 L. ed. 196.

The purpose of such limitation is well expressed in the following quotation:

> "The real ground is a great principle of public policy, which belongs alike to all governments, that the public interests should not be prejudiced by the negligence of public officers, to whose care they are confided. Without undertaking to lay down any general rule as applicable to cases of this kind, we feel satisfied that when, as in this case, a statute which proposes only to regulate the mode of proceeding in suits, does not divest the public of any right, does not violate any principle of public policy; but on the contrary, makes provisions in accordance with the policy when the government has indicated by many acts of previous legislation, to conform to State laws, in giving to persons imprisoned under their execution the privilege of jail limits; we shall best carry into effect the legislative intent by construing the executions at the suit of the United States to be embraced within the Act of 1828."

U. S. v. Knight, 14 Pet. 301, 10 L. ed. 465.

We believe all laws should receive a reasonable interpretation and the point is well stated in the following language:

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or any absurd consequences. And it will always be presumed that the Legislature intended exceptions to its language, which would avoid re-

sults of this character. The reason of the law in such cases, should prevail over its letter."

U. S. v. Kirby, 7 Wall. 482, 74 U.S. 482, 19 L. ed. 278.

We quote the foregoing as an apt formula to apply to the case at bar.

The Court's Construction of the Judgment of Imprisonment and Fine.

The District Court seemed to be of the opinion that because the penalty of fine had been reduced to a judgment, that makes a difference in the application of the rule.

We do not agree to this construction for the reason that it is founded upon a violation of law and represents the penalty involved therefor.

If any question is raised that this is a judgment and not a penalty, the case of *Farni v. Tesson*, 66 U.S. 309, 17 L. ed. 67, stating that an action for debt on bond is for penalty is in point.

Also:

"The term 'penalty' involves the idea of punishment and its character is not changed by the mode in which it is inflicted whether by a civil or a criminal prosecution."

U. S. v. Chouteau, 102 U.S. 603, 26 L. ed. 246.

U. S. v. Ulrici, 102 U.S. 612, 26 L. ed. 249; *Schick v. U. S.*, 195 U.S. 65, 49 L. ed. 99.

That there may be no question that the judgment of imprisonment and fine is still a penalty, we cite the following general rule:

"1. The legal operation and effect of a judg-

ment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every word and part. The legal effect, rather than the mere language used, governs. In cases of ambiguity or doubt, the entire record may be examined and considered. Judgments are to have a reasonable intendment."

34 C. J. 504, Sec. 794.

The record shows that the action is based upon a criminal judgment for imprisonment and fine as shown by the indictment (Tr. 10) and the judgment (Tr. 24).

Courts have generally refused to enforce the penal, criminal or revenue laws of another state and the penal character if not changed by reducing the penalty to a judgment and then suing upon such judgment, and while a Court cannot go behind the judgment, it may ascertain whether the claim is for a penalty and therefore one which Court should not enforce.

34 C. J. 1107, Sec. 1573.

"The validity of a judgment, within the rule above mentioned, referring to judgments under penal statutes, must be tested by the law of the state where such judgment was rendered. * * *

"An action founded on a judgment of a sister state must be governed by the rules of pleading and practice prevailing where such action is brought subject to the qualification that the procedure obtaining in the latter state cannot impair the efficacy of a judgment of a sister state, or deny an adequate remedy for its enforcement."

34 C. J. 1107, Sec. 1574.

It is our opinion that in whatever form the government may have elected to proceed, it would still be an action for the collection of a penalty, and whether the action is based upon an original action, or upon a judgment, a search of the record should be made by the court to find the basis of the cause of action and determine its character. The record in the case, the Complaint (Tr. 2), the agreed Statement of Facts (Tr. 6), the Indictment (Tr. 10), the Verdict (Tr. 22), and the Judgment of Conviction (Tr. 24), indicate the action was a penal proceeding.

We, therefore, suggest that the District Court was in error in making a distinction in this case because of the form of the action. It was in the beginning and is now an action to collect a penalty.

The *Schodde* and *McCutcheon* Cases Are Not Applicable.

The court in its conclusions of Law felt that *Custer v. McCutcheon*, 283 U.S. 514, 75 L. ed. 1239, and *Schodde v. U. S.*, 69 F.(2d) 866, entitle the United States to Judgment. We do not agree that these cases bind the court.

In the first instance, we assert that the statutes of the United States forbidding actions for penalties and forfeitures after five years were not involved in either case, and they are therefor not in point.

In the second instance, the decision involved the Idaho limitation and it cannot be authority except upon such litigation. The Washington statute not only limits such actions, but extinguishes them and the court observed in its opinion: "The court is not bound by a statute of limitation unless it so indicates

by statute." It is our contention the Congress has limited the action of this character.

Again we assert as indicative of the Congressional Mandate, the statutory limitation on actions involving custom violations which reads:

> "Section 1621. Limitation of actions.—No suit or action to recover any *pecuniary penalty* or forfeiture of property accruing under the customs laws shall be instituted unless such suit or action is commenced within five years after the time when the alleged offense was discovered: Provided, That the time of the absence from the United States of the person subject to such penalty or forfeiture, or of any concealment or absence of the property, shall not be reckoned within this period of limitation. (June 17, 1930, c. 497, Title IV, §621, 46 Stat. 758; Aug. 5, 1935, c. 438, Title III, §306, 49 Stat. 527)"
>
> Vol. 6A F.C.A., p. 924, Title 19.

The case at bar involved violations of Custom Laws as shown by the indictment (Tr. 10, 17) and while the quoted statute is not exactly in point, yet it indicates that the Congress intended to limit actions to certain fixed periods.

We believe Rule 30 of Local Rules of the District Court also should be considered, as under this rule the District Court has bound itself to the laws of Washington unless otherwise regulated by Congress and it is our contention that the penalty and forfeiture statute does regulate it and forbid the action, and therefore the *Schodde* and *McCutcheon* cases should not be controlling or authority for the entry of a judgment against the appellant.

CONCLUSION

We have not discussed the full faith and credit clause of the Constitution because we do not think it pertinent. We have stressed the points that we think dispose of the case and have demonstrated that neither by the laws of the United States or the laws of Washington or California, is there a valid judgment, and we do not believe where the law of the place destroys the effectiveness of the judgment and the law of the forum denies a remedy, that the United States should be permitted to proceed in this action.

This case has more than passing significance. It involves the rights of many poor and indigent prisoners who at present and in the future will be subject to great financial peril throughout their lives if the government is permitted to proceed.

A defendant in the simplest misdemeanor case will find himself unable to engage in gainful occupation, because if he does so, the government can impose a penalty and visit upon him financial distress.

The defendant in this case was a pauper at the time of his conviction and it is to be noted the government took from him all of his property, the sum of Fifty-one and 35/100 ($51.35) Dollars (Tr. 8) and does not now claim that he concealed or withheld any funds or property on the execution of the Judgment.

A defendant who has had visited upon him a fine as the only penalty for his offense, if the fine were substantial, would not have any opportunity to rehabilitate himself and would in the average case suffer financial ruin.

Ordinarily, we associate a fine with a minor offense,

but it appears now that a fine on an indigent debtor is a continuing punishment. This has not been the philosophy of our government. The purposes of the government has been expressed in its welfare enactments for the relief of needy persons during the past decade. We believe the same rule should be applied to indigent prisoners.

To hold the defendant subject to the fine at this late date, would, it seems be a weighty punishment.

The government has limited the filing of indictments in all cases, save only capital crimes, to certain periods. To attempt the distinction that because the debt has been reduced to a judgment, it loses its character as a penalty, is a strained construction and will produce inequitable results.

We therefore submit that the government has no cause of action, not only by its own laws, but by the laws of the states in which it was prosecuted, but even assuming that these suggestions are overruled, the facts and circumstances should be considered, and the government not be permitted to revisit on a defendant at a late date, penalties for a violation long since paid for.

The appellants respectfully submit: That the Judgment of the lower court should be reversed and the action should be dismissed.

Respectfully submitted,

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
MELVIN T. SWANSON,
PADDEN & MORIARTY,
Attorneys for Appellant.

No. 10523

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IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

vs.

W. S. D. SMITH,
Appellant.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT W. S. D. SMITH

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF OF APPELLANT W. S. D. SMITH

In an endeavor to answer the brief of the appellant, we believe it is fair to state that the appellee relies solely on a fine distinction of the meaning of Title 28, U.S.C.A. 791 to defend the judgment. It asserts the Congress did not intend to include a fine among the limited actions, but if it did, then because the fine was reduced to judgment, by this procedure it was *ipso facto* removed from the bar of the statute. We again reassert, "a fine is always a penalty," and the fact that it is now in the form of a judgment does not alter its character. None of the cases cited by appellee construe the U. S. Limitation Statute and the points made in the brief refer to civil cases

brought by the sovereign involving only limitation statutes of the several states and cases involving fine, faith, and credit provisions of the Constitution. We again assert that this case is governed by Section 791 and is barred.

"A fine reduced to judgment is still a penalty."

The brief of appellee dismissed the appellant's argument on this point with an unsupported statement that because the pecuniary punishment imposed, was reduced to a judgment of fine, its status was changed and asserts because "judgment" is not specifically mentioned the statute is not applicable. It has been said that "a judgment is the conclusion of law upon the matters contained in the record or the application of the law to the pleadings and to the facts as they appear from the evidence in the case as found by court or jury. * * *" 30 Am. Jur. p. 821. The facts submitted to the jury, as shown by the records of this court, indicate the appellant violated the law and was convicted by the jury and adjudged to pay a pecuniary penalty. The effect of a judgment on such evidence is to merge therein the cause of action on which it is brought. It does not enlarge the cause of action or change its character and its only effect is to make the cause of action *res adjudicata* between the parties and constitutes a bar to another action upon the same claim or demand. The record of appellate court shows that appellant Smith's case was affirmed on the 15th day of March, 1926, and the court takes judicial notice of this fact. See also (Tr. 24, 27).

The court will always look behind a judgment and will grant or deny relief according to the nature of the original cause of action as it did in *Louisiana v. New Orleans*, 109 U.S. 285, 27 L. ed. 936, and *Westmore v. Markoe*, 196 U.S. 69, 49 L. ed. 390.

In another case the court decided that an action is not changed by recovering judgment thereon but the court will search the record to ascertain if the claim is for a penalty and in refusing to enforce the penalty stated:

> "The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. *If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment.* Whart, Confl. L. §833; Westlake, Internat. L. 1st ed. §388; Piggott, Foreign Judg. 209, 210." (Italics ours)
>
> *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 32 L. ed. 239.

> "Liability for the penalty does not arise in contract but is laid in invitum as a disciplinary measure. Nor does the judgment determining the extent of guilt and declaring sentence change the liability for penalty to one for debt. *Chase v. Curtis*, 113 U.S. 452, 463, 464, 28 L. ed. 1038, 1042, 5 S. Ct. 554; *Boynton v. Ball*, 121

U.S. 457, 465, 466, 30 L. ed. 985, 986, 7 S. Ct. 981."

McCollum v. Hamilton Nat. Bank, 303 U.S. 245, 82 L. ed. 819.

This is stated in another way in the following case:

"It is well settled that however strong the reason may be, a court cannot engraft on a statute of limitations an exception which the statute itself does not make."

U. S. v. Mulland, 13 Int. Rev. Rec. 27.

See also:

In re Landsburg, 11 Int. Rev. Rec. 150;

U. S. v. Wright, 13 Int. Rev. Rec. 35;

U. S. v. Shorey, 9 Int. Rev. Rec. 202;

The Washington Supreme Court in discussing the definition of a fine and costs as a community obligation states:

"A fine is a sum of money exacted, as a pecuniary punishment, from a person guilty of an offense, while costs are but statutory allowances to a party for his expenses incurred in an action. The former is, in its nature at least, a penalty, while the latter approaches more nearly a civil debt."

Bergman v. State of Washington, 187 Wash. 622, 60 P.(2d) 699, 106 A.L.R. 1007.

The Attorney General of the United States has held that fines are within the limitation of the act.

14 Opinion of Atty. Gen'l. 81.

What did the judgment do to the original cause of action against the appellant? Nothing more than adjudicate the existence of the liability in question and subject the party to the penalty therefor. It could

not and did not alter the appellant's offense, it adjudicated it to be an indisputable fact. We do not believe that if the government were now attempting to collect the penalty in an initial proceeding, it would be urged by its counsel that U. S. statute did not apply to the action because it is apparent that it would be more than five years from the time "when the penalty or forfeiture occurred." Could it successfully be urged that it was not a "pecuniary penalty" because the exact word "fine" had not been used? We do not think so and the appellee concedes the weakness of its position when it attempts to use the case of *In re Sanborn*, 52 Fed. 583, and *United States v. Younger*, 92 Fed. 672, as authorites. One considered the question whether a fine is a debt within the constitutional provision abolishing imprisonment for debt and the other involves the issuance of a bench warrant in a civil action. No attempt has been made to distinguish the penalty definitions in the cases cited by appellant on pages 11, 12, of his brief but they are dismissed from consideration by the statement, "if Congress had intended to include a fine imposed upon the defendant for the commission of a criminal act, Congress would have said so." Who can say that the Congress did not consider, when it passed the legislation, that the generic term "penalty" included both civil and criminal proceedings and that "a fine is always a penalty, although a penalty is not always a fine." It is the court's province to construe the statute in light of the general definition and not place upon it a particular construction which would

cause an injustice. This is well expressed in a case relied on by the appellee wherein it is said:

> "The paramount duty of the court in construing a statute is to ascertain and give effect to the legislative intent. The duty has been well expressed by Judge John F. Philips of this circuit in *Rigney v. Plaster* (C.C.) 88 F. 686, 689: 'It is among the recognized canons of interpretation of statutes that the intention of a legislative act is often to be gathered from a view of every part of the statute, and the true intention should always prevail over the literal sense of the terms employed. "*When the expression of a statute is special or particular, but the reason is general, the expression should be deemed general; and the reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradition, and absurdity.*" 1 Kent. Comm. p. 462. Again, a thing within the intention of the legislature in framing a statute is often as much within the statute as if it were within the letter. *Riddick v. Walsh.* 15 Mo. 519; *Schultz v. (Pacific) Railroad Co.*, 36 Mo. 13; *State (ex rel. Missouri Mut. Life Ins. Co.) v. King*, 44 Mo. 283; *In re Bomino's Estate*, 83 Mo. 441'." (Italics ours)
>
> *Grier v. Kennan*, 64 F.(2d) 605 at p. 607.

May we ask, why should not the term "penalty" control the litigation when the intent of Congress is so apparent and a special or particular or strained construction would lead to palpable injustice? If we were seeking a strained statutory construction, we might well urge that 18 U.S.C.A., 569, set forth at page 7 of appellee's brief limits the government to a

single proceeding and execution on the judgment and that no right exists for the government to maintain this action.

In referring to a criminal case, Judge Cardozo states:

> "The payment of a fine imposed by a court of the United States in a criminal proceedings may be enforced by execution against the property in like manner as in civil cases. Rev. Stat. Sec. 1041, U.S.C.A., Sec. 569. In the discretion of the court, the judgment may direct also that the defendant shall be imprisoned until the fine is paid (citing cases). If the direction is omitted, the remedy by execution is exclusive."
>
> *Hill v. U. S.*, 298 U.S. 460, 80 L. ed. 1283.
>
> *U. S. v. Smith*, 28 F. Supp. 726.

Further it may be urged that appellants' liability in this case might be considered a second trial for the same offense.

The *La Franca* case cited in our opening brief held that a conviction under the National Prohibition Act barred a civil action for the collection of liquor taxes. The court said:

> "Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?"

The court in holding that it did not, quoted from another case, said:

> "Admitting that the penalty may be recovered

in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution. * * *

"To hold otherwise would be to sacrifice a great principle to the mere form of procedure, and to render settlements with the government delusive and useless."

U. S. v. La Franca, 282 U.S. 568, 75 L. ed. 551.

This observation might well be said of the government's suggestion that a judgment is not a penalty.

On the same day, Judge Sutherland, in passing upon an *in rem* proceeding for forfeiture, stated:

"In *United States v. La Franca*, 282 U.S. 568, *ante*, 551, 51 S. Ct. 278, decided this day, we hold that, under §5 of the Willis-Campbell Act (November 23, 1921, 42 Stat. at L. 223, chap. 134, U.S.C. title 27, §3), a civil action to recover taxes, which in fact are penalties, is punitive in character and barred by a prior conviction of the defendant for a criminal offense involving the same transactions. This, however, is not that case, but a proceeding *in rem* to forfeit property used in committing an offense."

U. S. v. Various Items, 282 U.S. 577, 75 L. ed. 558.

The following citation emphasizes the point:

"This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again

litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts. This is a necessary result of the rules laid down in the unanimous opinion of the judges in the case of *Rex v. Duchess of Kingston*, 20 Howell, St. Tr. 355, 538, and which were formulated thus: the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea at bar, or as evidence conclusive, between the same parties, upon the same matter directly in question in another court; and the judgment of a court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter between the same parties, coming incidentally in question in another court for a different purpose. In the present case, the court is the same court and had jurisdiction; and the judgment was directly on the point now involved and between the same parties."

Coffey v. U. S., 116 U.S. 436, 29 L. ed. 684, p. 687.

The Appellant's Other Authorities

We have discussed some of the cases cited by the appellee. We will discuss others and show that they are not applicable.

The *Kausch* case cannot be authority for the appellee's contention, as it merely interpreted the Volstead Act and decided that the Volstead Act provides, "A fine, a tax and a penalty as punishments have one and the same effect."

Kausch v. Moore, 268 Fed. 671.

The *Luther* case is not in point, as it involved a proceeding on a bail bond, and the court held that

this was an action on a contract, and the five year limitation did not apply, stating with reference to the statute, "on its face, this statute applies to a statutory penalty or forfeiure."

U. S. v. Luther, 13 F. Supp. 126.

The *Stockwell* case is, in our opinion, an authority favorable to the appellant rather than the appellee, stating:

> "Debt lies whenever a sum certain is due to the plaintiff, or a sum which can readily be reduced to a certainty—a sum requiring no future valuation to settle its amount. It is not necessarily founded upon contract. It is immaterial in what manner the obligation was incurred, or by what it is evidenced, if the sum owing is capable of being definitely ascertained."
>
> *Stockwell v. U. S.*, 80 U.S. 162, 20 L. ed. 491.

The *Pratt* case cited by the appellee has a pertinent observation:

> "Section 1042 was enacted for the relief of poor convicts under such circumstances and the entire section deals with the subject of imprisonment and relief from imprisonment, and has no reference to a discharge of the pecuniary obligations to the government. I therefore interpret the word 'discharge' to refer to 'his discharge from imprisonment,' and not from any *pecuniary obligations* imposed." (Italics ours)
>
> *United States v. Pratt*, 23 F.(2d) 333 at 334.

The statute we rely on specifically restricts actions

on penalties "pecuniary or otherwise," so the case cannot be considered as a precedent for the appellee.

We are unable to see the aptness of the *Wampler* case to the one at bar. It passes on the legality of a warrant of commitment made by Clerk of Court which departs in substance from the judgment back of it and decrees it to be void.

The *Houston* and *Godkin* cases involved questions of patent suits and suits on bonds and are not authorities pertinent to this litigation.

We have already discussed the *Schodde* case and the *McCutcheon* case. We again assert that they are not authorities for the government's position because they did not involve the U. S. limitation statute and therefore are not controlling on the court.

We again submit that this is an action brought by the United States to recover a penalty which has been reduced to a judgment, but even though reduced to a judgment, it is still a penalty and the five year statute is applicable. To hold otherwise, would visit a palpable injustice upon the appellant and leave many of the citizens who have rehabilitated themselves after serving a prison sentence continuously subject to financial harassment during their lifetime. We do not think the Congress intended this, and if it had so intended, it would have put in the words of exception "any penalties or forfeiture, pecuniary or otherwise except fines." It did not do so, so the statute should be applied to the fine and the judgment.

We respectfully submit that the judgment should be reversed and the cause dismissed.

Respectfully submitted,

CHARLES P. MORIARTY,
STANLEY J. PADDEN,
MELVIN T. SWANSON,
PADDEN & MORIARTY,
Attorneys for Appellant.

No. 10523

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

W. S. D. SMITH,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

STATEMENT OF JURISDICTIONAL FACTS

This is an action by the United States of America against the appellant, who, at the time of the commencement of the action, was a resident of the Northern Division of the Western District of Washington.

Jurisdiction is given by virtue of 18 U.S.C.A. 569 and 28 U.S.C.A. 41a.

FACTS

The facts involved in this cause are as follows: The defendant in 1924 was indicted by a Grand Jury of the United States District Court for the Southern District of California. He was tried, convicted and sentenced. The sentence imposed consisted of a penitentiary term of two years and a fine of $10,000. The offense upon which the sentence was based was a conspiracy to violate the Tariff Law of 1922. The term of imprisonment has been served. The fine of $10,000 remains wholly unpaid with the exception of $51.35.

In 1928 the appellant herein moved from the State of California to the City of Seattle where he has resided at all times since.

The action in the District Court was based upon the judgment of the District Court for the Southern District of California. The purpose of the action was to reduce the fine, therein imposed, to judgment in this District for the purpose of collecting the amount thereof from property now owned by appellant within the State of Washington. Appellant in his answer in the District Court admitted the fine and sought to

defend the same on various technical grounds. In his appeal he relies on the following:

1. That the United States is barred from the enforcement of the claim by virtue of the Statute of Limitations, referring particularly to 28 U.S.C.A. 791.

2. That the United States is barred from enforcement of the claim by virtue of the laws of the State of California and the State of Washington.

3. That by the taking of the pauper's oath, all liability ceased.

The District Court overruled all of these contentions and gave judgment in favor of the United States of America in the balance of the amount due on the fine.

JURISDICTION OF THE DISTRICT COURT

The action in this case was instituted by virtue of Revised Statutes 1041, found in 18 U.S.C.A. 569, which reads as follows:

> "In all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execu-

tion against the property of the defendant in like manner as judgments in civil cases are enforced. Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

This statute has been construed in a number of cases, the leading authorities being

Hill v. Wampler, 298 U.S. 463;
Grier v. Kennan, 64 Fed. (2d), 605.

In *Hill v. Wampler, supra*, the Supreme Court of the United States, at p. 463, said:

"The payment of a fine imposed by a court of the United States in a criminal prosecution may be enforced by execution against property in like manner as in civil cases. * * *. In the discretion of the court the judgment may direct also that the defendant shall be imprisoned until the fine is paid. * * *. If the direction for imprisonment is omitted, the remedy by execution is exclusive. Imprisonment does not follow automatically upon a showing of default in payment. It follows, if at all, because the consequence has been prescribed in the imposition of the sentence. The choice of pains and penalties, when choice is committed to the discretion of the court, is part of the judicial function. This being so, it must have expression in the sentence, and the sentence is the judgment * * *."

ARGUMENT

Counsel for appellant relies on 28 U.S.C.A. 791, reading as follows:

> "No suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States, shall be maintained, except in cases where it is otherwise specially provided, unless the same is commenced within five years from the time when the penalty or forfeiture accrued * * *."

Nowhere in this section do we find the words "fine" or "judgment" used. Counsel contends that penalty and fine are synonymous. The answer to his contention is that if Congress had intended to include a fine imposed upon the defendant for the commission of a criminal act, Congress would have said so.

While the two terms "penalty" and "fine" have been used interchangeably, the distinction between the two is aptly shown in two cases decided by the Circuit Court of Appeals for this District.

In the case of *In re Sanborn*, 52 Fed. 583, the defendant raised the issue that a *fine* was a debt—that therefore in view of the objection contained in the constitution of the State of Washington, the court had no power to imprison a person for failure to pay a fine. In overruling his contention, the Court held that:

> "It is clear that a fine imposed for the violation of laws for the punishment of crimes and misdemeanors is not such a debt as is within the scope of the provisions of the constitution abolishing imprisonment for debt, and Section 990 of the Revised Statutes is therefore not applicable to a criminal case."

On the other hand, the Court ruled just the opposite in regard to the penalty provisions of a statute from the same state. In the case of *United States v. Younger*, 92 Fed. 672, the Court held that actions for penalties are civil actions, as a penalty when incurred by the transgression of a statute, becomes immediately a *debt*, and upon an information filed by the United States Attorney charging an offense for which the Statute prescribes a penalty but does not make it a crime, a bench warrant will not be issued for the arrest of the defendant when the Constitution and laws of the State have abolished imprisonment for debt.

A penalty is a debt. To enforce the penalty, an action must be instituted. Under the statute if an action is instituted and the Government prevails, judgment follows, on which execution issues.

A fine, on the other hand, is itself a *judgment.* No suit is necessary. Execution issues immediately to enforce the judgment of the Court.

It is only in cases of this nature that any action is required, that is, for the purpose of enforcing the judgment of a Court in another jurisdiction.

18 U.S.C.A. 569, reads as follows:

> "In all criminal or penal causes in which *judgment* or sentence has been or shall be rendered, imposing the payment of a fine or penalty, whether alone or with any other kind of punishment, the said judgment, so far as the fine or penalty is concerned, may be enforced by execution against the property of the defendant in like manner as judgments in civil cases are enforced. Where the judgment directs that the defendant shall be imprisoned until the fine or penalty imposed is paid, the issue of execution on the judgment shall not operate to discharge the defendant from imprisonment until the amount of the judgment is collected or otherwise paid."

See also *United States v. Luther*, 13 Fed. Supp. 126.

In the case of *Kausch v. Moore*, 268 Fed. 671, the Court said:

> "A penalty is a sum of money, which the law exacts by way of punishment, for the doing of some act, which the law forbids, or for the failure to do some act, which the law requires to be done. It is true, as the definition foreshadows that sometimes the word "penalty" is undoubtedly used as a synonym of the word "fine"; but as used in the Volstead Act it cannot fairly be so construed, because by another provision of the act a fine as such is clearly provided for. Moreover, no authority can be conferred by Congress

upon the Commissioner of Internal Revenue to impose a fine in the strict sense of that word."

The distinction between fine and penalty is well brought out in the case of *Stockwell v. United States*, 20 L.Ed. 493, an action based upon a violation of the Tariff Law, to-wit, the Act of March 3rd, 1923:

> " * * * By referring to the 89th section of that act it will be seen that it directs all penalties, accruing by any breach of the act to be sued for and recovered, with costs of suit, in the name of the United States of America, in any court competent to try the same; and the collector, within whose district a forfeiture shall have incurred, is enjoined to cause suits for the same to be commenced without delay. This manifestly contemplates civil actions, as does the proviso to the same section, which declares that no action or prosecution shall be maintained in any case under the act, unless the same shall have been commenced within three years after the penalty or forfeiture was incurred. Accordingly, it has frequently been ruled that debt will lie at the suit of the United States, to recover the penalties and forfeitures imposed by statutes * * *."

The fine in this case constitutes a judgment of the Court. When the United States has recovered a judgment against a defendant, its right to revival of the judgment is not affected by any general statute of limitations.

United States v. Houston, 48 Fed. 207;

Godkin v. Chon, 80 Fed. 458;

United States v. Des Moines Val. R. Co., 70 Fed.

435; affirmed 84 Fed. 40;

United States v. Stinson, 197 U. S. 200, 49 L.Ed. 734.

That the imposition of a fine is a judgment is established by Rule 1, Rules of Criminal Procedure, Title 18, U.S.C.A., at p. 149:

> "After a plea of guilty, or a verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, and except as provided in Sections 724, 725, 726 and 727 of this title sentence shall be imposed without delay unless (1) a motion for the withdrawal of a plea of guilty, or in arrest of judgment or for a new trial, is pending, or the trial court is of opinion that there is reasonable ground for such a motion; or (2) the condition or character of the defendant, or other pertinent matters, should be investigated in the interest of justice before sentence is imposed. The judgment setting forth the sentence shall be signed by the judge who imposes the sentence and shall be entered by the clerk.
>
> "Pending sentence, the court may commit the defendant or continue or increase the amount of bail."

The Statutes of Limitations, as far as the Government is concerned, are to be strictly construed. In the case of *United States v. Nashville, et al*, 118 U.S. 126, 30 L.Ed. 81, the Court said:

> "It is settled beyond doubt or controversy—upon the foundation of the great principle of

public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided—that the United States, asserting rights vested in it as a sovereign government, is not bound by any statute of limitations, unless Congress has clearly manifested its intention that it should be so bound."

See also *United States v. Noojin*, 155 Fed. 379:

"This general principle is amply sustained by the multitude of authorities, both state and federal, cited in the note to the text. * * *. The effort is here made to prevent the United States from enforcing a judgment, secured in its own courts, for the sole benefit of the government. Every penny of the judgment, when collected, will become *eo instanti* the property of the United States. The negligence of the agencies of the government in failing to enforce the judgment and execution cannot be of avail to this movant here. The government is seeking the enforcement of its own rights, and is not, therefore, bound by any statute of limitations, nor barred by any laches of its officers however gross * * *.

" * * * The general rule that laches is not imputable to the government is essential to the preservation of the interests and prosperity of the public. This rule is founded upon the highest grounds of public policy, and any other doctrine would be ruinous in the extreme. All the property of the United States is held in trust for the people, and it is now well settled, upon grounds of public policy, that the public interests shall not to be prejudiced by the neglect of the officers or agents to whose care they are confided * * *. The Supreme Court of the United States has uniformly and repeatedly declared that in such cases

as this laches cannot be set up against the government."

The laws of the State of California and the laws of the State of Washington have no application as far as limitations are concerned when the judgment as rendered was in favor of the United States.

Chesapeake & Delaware Canal Company v. United States, 250 U.S. 123;

United States v. Thomas, et al, 107 Fed. (2d) 765;

Schodde v. United States, 69 Fed. (2d) 866;

Custer v. McCutcheon, 283 U.S. 514.

In the case of *Board of County Commissioners of the County of Jackson, Kansas v. United States*, 308 U.S. 351, the Court said:

> "Again, state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise * * *. This is so because the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments."

In the case of *Schodde v. United States, supra*, Ninth Circuit case, the Court said:

> "Further, this suit is predicated upon a judgment which runs in favor of the United States. The law is well established that the government is not bound by a state statute of limitations in

the absence of a clear manifestation of such intention * * *."

The case of *Custer v. McCutcheon, supra,* at p. 515, is extremely interesting as applied to the present case. This case went to the Supreme Court of the United States on certiorari from the Circuit Court of Appeals for the Ninth Circuit.

In that case the United States Marshal levied an execution issued September 21, 1929, out of the District Court of Idaho, against the petitioner upon a judgment entered in that Court March 7, 1921, in favor of the United States. Petitioner filed a bill in the same Court to restrain the Marshal from proceeding further under the execution process, on the ground that p. 6910 of the Idaho Compiled Statutes of 1919 permitted the issuance of execution only within five years from the date of the rendition of the judgment.

The Court, on p. 519, spoke as follows:

"It is clear, therefore, that R. S. p. 916 and rules of court adopted pursuant thereto confine the United States to such executions as may be issued by individuals under the state statutes, and impose upon it the same restrictions and exemptions as are applicable to other suitors, and the question here is whether an exception should be made to this general rule as respects the time fixed by the state statute within which execu-

> tion must issue. We see no valid reason for making such an exception. The time limited for issuing executions is, strictly speaking, not a statute of limitations. On the contrary, the privilege of issuing an execution is merely to be exercised within a specified time, as are other procedural steps in the course of a litigation after it is instituted. The plaintiff is not precluded from bringing an action upon the judgment, but merely from having an execution in the form provided by state law."

Following this case, an action was instituted on June 15, 1931, over ten years after the original judgment, by the United States against Schodde, et al. The complaint pleaded the judgment and that it had not been reversed, set aside, modified or paid.

In its memorandum opinion the Court pointed out that the Supreme Court in the case of *Custer v. McCutcheon, supra*, held that the plaintiff here was not precluded from bringing an action upon the judgment, but merely from having execution in the form provided by state law. The Court said at p. 870:

> "This suit is predicated upon a judgment which runs in favor of the United States. The law is well established that the government is not bound by a state statute of limitations in the absence of a clear manifestation of such intention."

Schodde v. United States, 69 Fed. (2d) 866.

Counsel for appellant in his brief has raised a question in regard to the statutes of the State of Cali-

fornia and the statutes of the State of Washington relating to the lien of the judgment and the execution issuing upon judgments. Liens, executions and supplementary proceedings are all matters of procedure. On matters of procedure our courts have ruled that State limitations apply to the United States just as to an individual. The same courts have uniformly ruled that the Statute of Limitations do not apply to the cause of action itself. For example, in the present instance, the United States of America could not obtain an execution based upon the judgment as heretofore rendered in the State of California without bringing an independent action for the revival of the judgment. This is due to the fact that the State has a right to pass laws relative to procedural matters. But as pointed out in the *Custer* case and in the *Schodde* case, the fact that the Court cannot issue execution does not preclude the Government from bringing an action to recover the amount of the debt as determined by the judgment heretofore rendered. The two cases—the *Schodde* case and the *Custer* case—one by the Supreme Court of the United States and the other by the Circuit Court for this District, are conclusive as far as the questions involved in this case are concerned.

Relative to the third question raised, namely, that by taking the pauper's oath, the defendant was released from all liability as far as the execution from all civil liability, as well as imprisonment, the case of *United States v. Pratt*, 23 Fed. (2d) 333, is conclusive in this matter.

Respectfully submitted,

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